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No. 85-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOEL LEVINE, STANLEY I. GREENBERG
AND RICHARD MILLER,

Petitioners,

vs.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a federal criminal case, a restraining order prohibiting broad categories of extra-judicial comments by criminal defendants and their attorneys based upon a government interest in the "integrity of the judicial process" is inconsistent with the First Amendment absent a clear and present danger to the right to an impartial jury.

2. Whether the six categories of prohibited speech specified by the Court of Appeals, and adopted by the trial court, are vague or overbroad, and thus inconsistent with the First Amendment.

3. Whether federal criminal defendants and their attorneys subject to a restraining order preventing them

from making extra-judicial comments concerning an on-going criminal case have standing to assert the rights of access of the media and the public affected thereby.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners Joel Levine, Stanley I. Greenberg and Richard Miller respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 24, 1985, as amended on August 19, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals, as amended, is reported at 764 F.2d 590 (9th Cir. 1985), and appears as Appendix C hereto. The orders on and dissenting opinions from the denial of Petitioners' Petition for Rehearing and Suggestion for

Rehearing En Banc are reported at 775 F.2d 1054 (9th Cir. 1985), and appear as Appendix E hereto. The three restraining orders issued by the District Court (both before and after the Ninth Circuit's Judgment) appear, respectively, as Appendices A, B and D hereto.

JURISDICTION

The judgment of the Court of Appeal for the Ninth Circuit was entered on June 24, 1985, and amended on August 19, 1985. A timely petition for rehearing and suggestion for rehearing en banc was filed on July 8, 1985, and was denied on November 1, 1985. This petition for a writ of certiorari is filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case presents an opportunity for this Court to address directly, for the first time, the important and far-reaching constitutional concerns raised by "gag" orders restraining extra-judicial comments by federal criminal defendants and their attorneys. The restraining orders issued below impact directly upon the First Amendment rights of criminal defendants and their attorneys, the Sixth Amendment right to a fair trial, and the First Amendment rights of the press and the public to access to information about criminal trials.

These vital issues of first impression are presented on the very eve of the retrial of a much-publicized criminal case in which an order expressly prohibiting a broad range of extra-judicial comments by

the trial attorneys has been in place since March 5, 1985.[1/]

The underlying criminal trial in this case is that of Petitioner Richard Miller, a former FBI agent arrested on charges that he engaged in espionage activities by means of transmitting information to Svetlana Ogorodnikova and Nikolay Ogorodnikov, a married couple of Soviet national origin.

From the outset, this case attracted substantial media coverage across the country. Miller's arrest on October 2, 1984, was photographed and recorded for the print and electronic media, and on

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1/ Petitioner Miller is now scheduled to be retried on February 13, 1986. The trial is expected to last approximately three months. Miller's last trial ended in a mistrial. Miller has been held in detention since his arrest; he has been denied access to the media during this period. Thus, his primary means of communicating his views about the case to the public is through his attorneys.

October 12, 1984, the Government publicly announced a thirteen-count indictment of Miller for selling secret FBI documents to the Soviet Union. Several high ranking government officials, including then-Attorney General William French Smith, FBI Director William Webster, United States Attorney Robert Bonner and Richard Bretzing, the FBI Special Agent in Charge of the Los Angeles Office, held highly publicized press conferences in which they forcefully presented the Government's case against Miller and stated, incorrectly, that Miller had "confessed" to the charges in the indictment. Additionally, a lengthy affidavit (signed by P. Bryce Christensen, the Assistant Special Agent in Charge of the FBI's Los Angeles Office) presenting the Government's grounds for the arrest and

search warrants was released to the news media.

Petitioners Joel Levine and Stanley I. Greenberg have represented Miller since on or about October 17, 1984. While Petitioners have held no press conferences about the case nor issued any press releases, they did on occasion respond to a handful of the hundreds of press inquiries they received concerning certain aspects of the case. In particular, Petitioners Levine and Greenberg attempted to rebut the public impression generated by the Government that Miller had "confessed" or that the Government had caught him "red-handed" in espionage activities.

The trial judge first admonished counsel about pre-trial publicity at a status conference on November 7, 1984. On November 28, 1984, the Government

filed its first Motion for Restraining Order Re: Extrajudicial Statements of Parties and Their Agents. This motion sought an order restraining all attorneys and the defendants in the case, and their representatives and agents, from making "any statement to members of any television, radio, newspaper or magazine organization concerning: the evidence produced or expected to be produced at trial; the strength or weakness of the case; the theories of the prosecution or defense; the actual or anticipated testimony or credibility of prospective witnesses; or the motives of the parties or their counsel in prosecuting or defending the case." The Government's motion was heard on December 14, 1984, and denied by the District Court.

On March 3, 1985, an article appeared in the Los Angeles Times in which Petitioner Greenberg expressed the view that the Government's charges against Miller were exaggerated. In response to this article, the Government filed an Ex Parte Application to Renew Motion for Restraining Order Re: Extrajudicial Statements of Parties and Their Agents. This motion was heard on March 5, 1985. At this hearing, largely in response to this one article, Judge Kenyon issued a "gag" order prohibiting the parties and their agents from communicating to the media about the "merits" of the case.[2/] See Appendix A hereto.

On April 12, 1985, Petitioners filed an Emergency Petition for Writ of Mandamus in the United States Court of

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2/ Judge Kenyon later excluded Petitioner Miller from the order. See Appendix B hereto.

Appeals for the Ninth Circuit. Petitioners challenged the constitutionality of the trial court's "gag" order as an unconstitutional prior restraint and as an impermissible infringement on the rights of the press and the public to access to criminal trials. Additionally, Petitioners argued the language of the order was impermissibly vague and overbroad.

The Petition for a Writ of Mandamus was granted by the Ninth Circuit and the Court's majority opinion, authored by Judge Beezer, was issued on June 24, 1985. See Appendix C hereto. In his opinion Judge Beezer acknowledged that the District Court's order was properly characterized by Petitioners as a prior restraint and was therefore subject to the strict scrutiny test articulated in Nebraska Press Association v. Stuart, 427

U.S. 539 (1976). The panel then determined that the Government had demonstrated that the limited public statements of the attorneys in the Miller case had posed a "serious and imminent threat" to a protected competing interest and that less restrictive alternatives were not available. The court concluded, however, that the order issued by Judge Kenyon was overbroad and suggested a list of six subject areas as to which attorney comment could be proscribed. On July 23, 1985, Judge Kenyon amended his Restraining Order to prescribe all attorney comment falling within the categories of speech identified in Judge Beezer's opinion. See Appendix D hereto.

In upholding the prior restraint issued by the district court below, the Court of Appeals radically departed from established precedent in other Circuits.

The Ninth Circuit's decision rested on an entirely new concept of "prejudice" based not on the impact of publicity on the ability of a trial court to insure a fair trial -- in the sense of obtaining an impartial jury -- but on the impact of public comments by the attorneys on the "integrity of the judicial process" and the public's perception of the fairness of the trial. The panel also declined to require clearly articulated findings of prejudice supported by specific evidence in the record and explicitly accepted instead only generalized and concededly "speculative" assumptions of "prejudice."

Judge Sneed filed an opinion concurring in each portion of Judge Beezer's opinion for the panel, though with somewhat different reasoning. Judge Nelson filed a concurring and dissenting opinion. Judge Nelson dissented from the finding

that a "serious and imminent threat to the administration of justice" was presented in this case. This dissent was based on the principle that attorney comments could be limited consistent with the First Amendment only if there were specific findings that such comments would make it impossible to empanel an impartial jury in this case given the complete absence of such evidence in the record before the Ninth Circuit.[3/]

On July 8, 1985, Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit. The Petition for Rehearing was denied by the panel on November 1,

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3/ In a Supplemental Memorandum filed August 17, 1985, Petitioners supplied the Ninth Circuit with irrefutable evidence that the publicity in this highly publicized case had little impact on the empanelling of an impartial jury. This evidence indicated that the publicity in the case was damaging mainly to Petitioner Miller.

1985, by a vote of two to one. A dissent to the denial of the Suggestion for Rehearing En Banc was filed by Judge Norris and joined in by Judges Pregerson, Ferguson, Nelson and Reinhardt.

The dissenting judges concluded that this case posed an "extraordinarily important" constitutional question whose resolution was likely to have "a broad impact on the freedom of expression of trial participants throughout the nation." Appendix E, at A-109, 110. They believed the decision would "significantly restrict the media's ability to gather information and the public's right to be informed about our criminal justice system" and would inescapably create a "chilling effect on lawyers called upon to represent unpopular defendants in high visibility cases." Appendix E, at A-110, A-115. Additionally, the dissenting judges argued that

the Ninth Circuit's unprecedented approval of a restraining order under a purported "clear and present danger" standard could not be reconciled with this Court's decision in Nebraska Press Association.

The opinion of the Ninth Circuit below creates, for the first time, a Government interest in the "integrity of the judicial process" superior to the constitutionally guaranteed First Amendment rights of trial participants and equal to the Sixth Amendment fair trial rights of criminal defendants. This novel, newly-created compelling interest has no support in any decision of either the Ninth Circuit or this Court. Indeed, the prior restraint of First Amendment rights based upon an admittedly speculative "appearance" of prejudice -- rather than upon a showing of actual prejudice affecting a fair trial -- directly contravenes this Court's holding

in Nebraska Press Association, supra. The panel's approach is also in conflict with the approach to these issues in other Circuits. See, e.g., Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970). Thus, there is a split among the circuits which should be resolved.

For the first time, the panel also endorses six categories of information as acceptable subject matter for prior restraints on extra-judicial comments in criminal cases. These categories are unconstitutionally vague and overbroad. By adopting, almost verbatim, ethical guidelines intended to be the basis for disciplinary proceedings against attorneys, the court below has transferred these guidelines into a Sword of Damocles over the heads of attorneys called upon to represent unpopular defendants in high visibility cases.

Finally, the Ninth Circuit panel rendered its decision without considering the First Amendment newsgathering and access rights of the press and the public. It did so, moreover, in a way which conflicts directly with this Court's decisions holding that those who are directly affected by a challenged order have standing to assert the rights of those who are indirectly affected by the same order.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION DIRECTLY CONTRAVENES THE LIMITS ON PRIOR RESTRAINTS ESTABLISHED BY THIS COURT IN NEBRASKA PRESS ASSOCIATION V. STUART

In Nebraska Press Association v. Stuart, 427 U.S. 539, 562 (1976), this Court established the test for the constitutional validity of restraining orders issued in the context of publicity surrounding criminal proceedings. Under

the standards of Nebraska Press, an appellate court must "examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent a threatened danger." Nebraska Press, supra, 427 U.S. at 562. A restriction on First Amendment freedoms, this Court has held, can be justified only by "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." NAACP v. Button, 371 U.S. 415, 438 (1963). In the context of criminal trials the state interest under Nebraska

Press is the ability to empanel an impartial jury. Nebraska Press, supra, 427 U.S. at 551

No compelling government interest was demonstrated to justify the prior restraint imposed below. Indeed, the Ninth Circuit upheld the "gag" order issued by Judge Kenyon in the absence of any specific findings of prejudice affecting the ability to conduct a fair trial. Thus, the Ninth Circuit's decision in this case is a radical departure from the letter and spirit of Nebraska Press.

A. The Ninth Circuit's Decision Rests Upon The Exultation Of A Government Interest In The "Appearance" Of A Fair Trial And The "Integrity Of The Judicial Process" Over The First Amendment Rights Of Criminal Defendants And Their Counsel.

The Ninth Circuit's decision expressly recognizes that a "gag" order limiting attorney comments is a prior

restraint and subject, therefore, to the strict scrutiny test established by this Court in Nebraska Press Association. Under Nebraska Press, such an order may be upheld only if the government establishes: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available. Nebraska Press, supra, 427 U.S. at 562.

The only constitutionally cognizable competing "interest" at stake in any case involving publicity of a criminal trial is the right to a fair trial. Nebraska Press, 427 U.S. at 551. See also Sheppard v. Maxwell, 384 U.S. 333 (1966). Indeed, it is precisely this right to a fair trial that is guaranteed to the defendant by the Sixth Amendment. The

concern for "prejudice" caused by publicity surrounding a trial, therefore, is primarily a concern that intense media coverage will prevent the empanelling of an impartial jury. Nebraska Press, supra. See also CBS, Inc. v. United States District Court, 729 F.2d 1174 (9th Cir. 1983). Only when this degree of potential prejudice is shown can the various means available to counter the effect of such publicity be considered.

The Ninth Circuit's decision is not based on a determination that an impartial jury could not be found in this case. It is based instead on the novel concept that the extra-judicial statements of trial participants create prejudice to the "integrity of the judicial process." Appendix C, at A-57. The precise nature and scope of this

interest is not explained in the Ninth Circuit's decision.

The "prejudice" found by the Ninth Circuit appears to be based on the mere fact of attorney comments; it is unrelated to the actual impact such comments have on the ability of a trial court to empanel an impartial jury. Indeed, the Ninth Circuit rejected a range of alternatives to a "gag" order because such alternatives would not address its concern for the "integrity of the judicial proces" even if such alternatives would eliminate any threat to the empanelling of an impartial jury. Id. at A-57.

This notion of prejudice is fundamentally inconsistent with Nebraska Press. See also Gannett Co. v. De Pasquale, 443 U.S. 368, 441-442 (1979)

(Blackmun, J., concurring and dissenting); Associated Press v. U.S. District Court, 705 F.2d 1143, 1145-1146 (9th Cir. 1983); accord CBS, supra, 729 F.2d at 1179 n.5; United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982).

It is inconceivable that the Government's or the public's interest in the "integrity of the judicial process" is entitled to substantially greater protection than a criminal defendant's Sixth Amendment right to a fair trial, yet that is the inescapable result of the reasoning employed in the Court's decision. Under this new standard, extrajudicial attorney comments which have no material impact on the integrity of fact finding by criminal juries will be suppressed based upon judicial assumptions about the public's perceptions about attorney behavior. Clearly this

was not the intention of this Court in requiring that a compelling government interest be shown before any prior restraint can be imposed.

B. The Ninth Circuit's Decision Establishes For The First Time An Analysis Of Prior Restraints Based On The Status Of The Speaker, Rather Than On The Impact Of The Speech Upon The Trial

The Ninth Circuit's decision exempts, for the first time, restraining orders imposed on attorneys and trial participants in a criminal case from the prior restraint analysis set out by this Court in Nebraska Press. As noted by Judge Norris in his dissent to the denial of en banc review, implicit in Judge Beezer's majority and Judge Sneed's concurring opinion is a notion that attorneys ought not discuss their cases with the press and that this advisory ethical principle permits greater

restrictions on the free speech rights of trial participants than on the rights of non-participants. Appendix C, at A-48. By exempting prior restraints on attorneys or criminal defendants from the Nebraska Press strict scrutiny requirement, the Ninth Circuit establishes two tiers of First Amendment rights. More significantly, the Ninth Circuit's decision condones an analysis of prior restraints based on the source of the trial publicity rather than on the actual impact of that publicity on the trial. Neither of these notions have any constitutional basis.

The Ninth Circuit's decision relies upon this Court's decision in Sheppard v. Maxwell, 384 U.S. 333, 360-63 (1966) and Nebraska Press, supra, 427 U.S. at 564, to reduce the First Amendment rights of trial participants. Neither of these

decisions hold that a different First Amendment standard applies to "gag" orders issued against attorneys.

Footnote 8 in Chief Justice Burger's opinion in Nebraska Press expressly states that the Court was not confronted in that case with the issue of the constitutionality of restraints on lawyers in a criminal case. Nebraska Press, supra, 427 U.S. at 564, n.8. At this point in the Nebraska Press decision, the Court refers to certain ABA proposals -- proposals which have subsequently undergone substantial revision -- and not to any holding of the Court. Earlier in the Court's opinion, Chief Justice Burger cited to language in Sheppard which seems to indicate that attorney gag orders are appropriate in some circumstances. Id. at 564. However, this reference is not

part of the holding of the case and certainly does not support the unprecedented issuance of gag orders against attorneys without a constitutionally adequate showing of community-wide "prejudice." Id. at 553-554.

In Sheppard itself, this Court suggested that in the exceptional circumstances present in that case the trial judge should have controlled the statements of counsel. However, the primary source of prejudicial publicity in the Sheppard case was, as here, statements made by government officials which threatened the defendant's Sixth Amendment right to a fair trial. The statements in Sheppard suggesting that attorney comments might be "controlled" by a trial judge were dictum. Moreover, the facts in the Sheppard case were so exceptional that they probably would have

satisfied the Nebraska Press standard, thus permitting narrowly tailored protective orders restraining not only attorneys but the media as well.

Sheppard cannot be read as a blanket endorsement of gag orders against attorneys without the required showing of community-wide prejudice. See Hirschkop v. Snead, 594 F.2d. 356, 380 (4th Cir. 1979) (concurring opinion). In fact, the only cases dealing squarely with gag orders issued against attorneys have invalidated such orders. See, e.g., Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) (vacating an order prohibiting statements to press by defendants and defendants' counsel in case arising out of destruction of Selective Service records absent specific findings of a clear and present danger.); Cf. In re Oliver, 452 F.2d. 111 (7th Cir. 1971).

The cases cited by the Ninth Circuit as establishing the validity of attorney gag orders do not in fact establish this proposition. However, these cases do indicate that this Court should directly address the constitutional standard applicable to attorney "gag" orders -- an issue left open in Nebraska Press and Sheppard. Though this Court has never ruled directly on this issue, the dicta in Nebraska Press and Sheppard has had an important impact on the approach taken by the lower courts which have addressed these issues. See Saxbe v. Washington Post Co., 417 U.S. 843, 846 (1974).

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976), involved a pre-Nebraska Press appeal by a journalist jailed because of his refusal to divulge the source of certain information. In dictum, the Ninth

Circuit indicated that this Court in Sheppard had suggested that "gag" orders on trial participants were an appropriate response to problems of pre-trial publicity. Id. at 468.

Similarly, the Tenth Circuit's pre-Nebraska Press decision in United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969), concerned a collateral challenge to an attorney gag order in a contempt proceeding rather than a direct challenge to the constitutionality of the order. Again, the Tenth Circuit was heavily influenced by the language in this Court's decision in Sheppard.

In United States v. Schiavo, 504 F.2d. 1 (3d Cir.), cert. denied, 419 U.S. 1096 (1974), the Third Circuit overturned an order enjoining the media from publishing certain information

during a perjury trial. The court referred to attorney gag orders in dictum. Id. at 6.

In Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974), Justice Powell stayed a trial court order restraining the press from reporting on a criminal trial. In footnote 3, Justice Powell notes that the parties had not appealed a gag order prohibiting the parties and their counsel from making extrajudicial statements.

In In re Russell, 726 F.2d 1007 (4th Cir.), cert. denied, _____ U.S. _____, 83 L.Ed.2d 74, 105 S.Ct. 134 (1984), the Fourth Circuit affirmed a gag order upon potential witnesses in the criminal prosecution of alleged members of the Ku Klux Klan and Nazi Party in connection with the 1979 killings of five individuals participating in a demonstration

in Greensboro, North Carolina. See generally In re Greensboro News Co., 727 F.2d 1320 (4th Cir. 1984).

In Central South Carolina Chapter, Society of Professional Journalists v. Martin, 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978), none of the defendants objected to the restraints on extrajudicial statements imposed by the trial judge and, accordingly, the Court of Appeals expressed "no opinion as to its propriety." Id. at 708.

The above cases were cited by the Ninth Circuit as indicating overwhelming authority for the proposition that courts may issue orders restricting the speech of parties or their attorneys without satisfying the exacting standards delineated in Nebraska Press. Though the cases cited by the Ninth Circuit, on

careful scrutiny, do not stand for this proposition, there is great uncertainty in and conflict between the lower federal courts and in state courts with respect to the proper constitutional standards to be applied in these situations.

Petitioners contend that the decision in Chase v. Robson, supra, which was not appraised by the Ninth Circuit, presents a clear conflict among the circuits while employing proper First Amendment principles in circumstances analogous to the case at bar. Chase involved criminal proceedings against a number of draft protesters. Unlike the instant case in which Petitioners have not initiated media contacts, the defendants in Chase had allegedly "sought publicity by such activities as contacting the press and issuing statements and press releases." Id., 435 F.2d at 1060. The trial judge issued an order -- remarkably

similar to that endorsed by the Ninth Circuit -- barring both defendants and counsel for all parties from making any statements

> regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses, or the rulings of the court.

Id. The order was to remain in force throughout the pendency of the action.

The Seventh Circuit struck down this gag order as constitutionally impermissible. It held that

> before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice."

435 F.2d at 1061, quoting Craig v. Harney, 331 U.S. 367, 373 (1947). The Ninth Circuit's acceptance of generalized "speculative" assumptions of prejudice (Appendix C,

at A-59-66) runs directly counter to the Seventh Circuit's insistence upon "specific findings." See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (requiring "an overriding interest articulated in findings" to support access denial); accord, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 n.20 (1982); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984); Waller v. Georgia, 467 U.S. 39, 81 L.Ed.2d 31, 39 (1984). Accordingly, intervention by this Court is critical to resolve this fundamental conflict between the circuits.

Finally, the court in Chase also emphasized the importance of the defendants' and counsel's First Amendment rights of expression:

> While we agree "[i]t is fundamental to our system of constitutional democracy that issues of law and fact in a criminal proceeding be resolved in the courts, and not in the news

media nor in the streets," we believe that equally fundamental to our system is the right of all citizens, even if they be criminal defendants to exercise their first amendment rights. [Emphasis added.]

C. The Ninth Circuit's Decision Erroneously Concludes That The Restraining Order Below Has No Impact On The First Amendment Rights Of Petitioner Miller And On The Public's and Press' Right of Access

The Ninth Circuit concluded that restraints on the speech of attorneys have no impact on the right of access of the media and the public (Appendix C, at A-42-44), or the free speech rights of the criminal defendant himself. These propositions are neither sound in theory nor accurate under the particular circumstances of this case. Indeed, as Judge Norris noted in his dissent to the denial of a hearing en banc, the decision of the Ninth Circuit in this case "is likely to

have a broad impact on the freedom of expression of trial participants throughout the nation." Appendix E, at A-109-110. Moreover, the decision will significantly restrict the media's ability to gather information and the public's right to be informed about our criminal justice system." Id. at A-110.

The vitality of the public's "right to know" and the press' "right of access" found expression in Richmond Newspapers, Inc. v. Virginia, supra. In overturning a state court judge's order closing a murder trial to both the press and public at the request of the accused, Chief Justice Burger noted that "[f]ree speech carries with it some freedom to listen." Id., 448 U.S. at 576. Quoting from First National Bank of Boston v. Bellotti, 435 U.S. 765, 783, reh. denied, 438 U.S. 907 (1978), this Court reaffirmed that:

> "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."

The Chief Justice also quoted from Kleindienst v. Mandel, 408 U.S. 753, 762 (1972):

> "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'"

Just as surely as the corporate campaign spending limitations at issue in Bellotti, supra, unconstitutionally trenched upon the voting public's right to learn of differing political viewpoints, the challenged gag order ineluctably infringes upon the public's constitutionally guaranteed "freedom to listen." Indeed, in Bellotti, supra, Justice Powell noted that certain of the Supreme Court's earlier decisions "seemingly based exclusively on the

individual's right to express himself acknowledge that the expression may contribute to society's edification." Id., 435 U.S. at 783; see Winters v. New York, 333 U.S. 507, 510 (1948); see generally Comment, The Constitutional Right to Know, 4 Hastings Const. L.Q. 109 (1977); Nimmer on Freedom of Speech, §1.02[F][1], pp. 1-20-22 (1984) ("The Supreme Court has repeatedly recognized that the members of an audience (or putative audience) have a First Amendment interest independent of the speaker's").

Likewise, the challenged order even more directly impinges upon what has variously been described as the press' "right of access" or "right to gather information." Richmond Newspapers, supra, 448 U.S. at 576. As Justice White

recognized in Branzburg v Hayes, 408 U.S. 665, 681 (1972):

> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

Id., 408 U.S. at 681 (emphasis added).

The right of press access is especially important where, as here, the suppressed speech would focus critical attention on the Justice Department, the United States Attorney's Office, the Federal Bureau of Investigation and, perhaps, the trial court. "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . [serving to guard] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and

criticism." Sheppard v. Maxwell, supra, 384 U.S. at 350; Freedman & Starwood, Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan.L.Rev. 607, 612-13 n.39 (1977) ("Justice Brennan also expressed concern that 'judges and committing magistrates might . . . be determining the propriety of publishing information that reflects on their competence, integrity or general performance on the bench,' thereby exacerbating 'the potential for arbitrary and excessive judicial utilization of any such power' and for 'overemployment of the technique'").

The challenged gag order effectively prohibits media access to the comments of trial participants in the case at bar.

In many instances, this will mean a censoring of the only meaningful interpretation of the events of the investigation and trial. The press may be free to report the facts of crimes and criminal trials, but the recitation of these facts, without input from those with the legal training, special incentives and knowledge to critically assess those facts cripples the press' oversight function. "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied sub nom. Cunningham v. Chicago Council, 427 U.S. 912 (1976); see also L. Tribe, American Constitutional Law, ¶ 12-11, p. 628 n.26 (1978). The press'

oversight function "can be severely impaired, of course, if those who are most knowledgeable about injustices are silenced at the very moment at which they have the greatest incentive to protest." Freedman & Starwood, supra, 29 Stan.L.Rev. at 613.

Because of the practical limitations inherent in the hourly and daily reporting of legal news by the print and broadcast media, press fairness, accuracy, objectivity and responsibility will be undermined without access to key trial participants. In this case, the press is precluded from seeking opposing counsel's reaction to potentially inflammatory, inaccurate and prejudicial information contained in public record submissions. Thus, the "truth" will never catch up with the initial "lie" imbedded in the public's conscience.

Just as a retraction which appears days or weeks after an inaccurate story cannot be expected to completely undo the damage initially suffered, so press reports (if any) discussing the refutation of any allegations by opposing counsel in subsequent public record submissions will never fully remove the taint of the initial inaccuracy. In short, the denial of access to newsmakers is, for all intents and purposes, an unconstitutional denial of access to the news. Moreover, publicity is dependent on which party has the greatest opportunity to present its side of the case in the public record prior to trial. In a criminal prosecution, this will always benefit the Government.

If anything, the years since the Richmond Newspapers decision have resulted in an increased sensitivity on

the part of this Court to issues of press access. For example, in Globe Newspaper Co. v. Superior Court, supra, the Court held unconstitutional a state statute which required the exclusion of both press and public from the courtroom during testimony of a minor rape victim. Likewise, in Press-Enterprise Co. v. Superior Court, supra, the Court found that the press and public had a First Amendment right of access to jury voir dire proceedings. Finally, in Waller v. Georgia, supra, the Court unanimously concluded that the confluence of the First Amendment rights of access of the press and public and the Sixth Amendment public trial rights of the accused warrant the opening of an evidentiary suppression hearing.

The challenged "gag" order ineluctably trenches upon the fundamental constitutional rights of both the public

and press. For this reason alone it should be subject, at the very least, to the strict standards of Nebraska Press, supra.

Finally, the Ninth Circuit concluded that the restraining order issued by the trial court does not affect Petitioner Miller's ability to communicate with the media as it allows his attorneys to fully present his case in open court. Appendix C, at A-38, fn.1 . This finding is simply erroneous. Richard Miller continues to be held effectively incommunicado at the federal prison on Terminal Island. As Judge Norris noted in his dissent, "to deprive an accused of the most valuable resource in criticizing the Government -- the lawyer -- is to restrict, and restrict severely, his First Amendment rights." Appendix E, at A-114.

The notion that the Government can silence a person by bringing a criminal prosecution is entirely alien to American history and jurisprudence. See, e.g., Chase v. Robson, supra, 435 F.2d at 1061. A person charged with a criminal offense by the Government has an absolute right to proclaim his or her innocence and to raise questions about the Government's motivation and conduct in bringing the prosecution. The decision to prosecute is often a political decision and may represent the implementation of Government policies which are the subject of intense public discussion and debate. Moreover, the conduct of a criminal investigation and prosecution is always an appropriate subject of public discussion and debate. These factors are certainly present in this case. As the Court in Nebraska Press emphasized, "the

press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecution, and the judicial processes to extensive public scrutiny and criticism." Nebraska Press, supra, 427 U.S. at 560, citing Sheppard v. Maxwell, supra, 384 U.S. at 350. A judge cannot be permitted to silence a defendant and his attorneys if they choose to participate in this debate. At a minimum, the exacting standards of Nebraska Press must be rigorously applied where judicial authority is invoked to stifle such discussion.

The reality of press coverage of criminal prosecutions, as exemplified by this case, underscores this point. Petitioner's arrest and indictment were accompanied by massive press coverage orchestrated by the Government. The

indictment and the affidavit used to obtain arrest and search warrants presented the Government's side of the case in a manner prejudicial to Petitioner Miller. The media coverage based on these Govenment documents, Government press conferences and Government press releases was thus one sided, as it always will be at the outset of a criminal prosecution. For the Government to turn around and seek a gag order on all parties and attorneys after it structures the media overture of a criminal prosecution to its liking is outrageous Government conduct. The answer to such conduct is not suppression of speech; it is the right to engage in more speech. The defendant, directly or through his or her counsel, is entitled to rebut what the Government has said subject only to

the restrictions envisioned in Nebraska Press if a sufficient showing is made.

Moreover, the notion that the jury will decide the issues relating to Miller's reputation or the legitimacy of the Government's conduct is simply wrong. In the courtroom, legal claims will be resolved in accordance with rules of evidence and procedure for a narrow purpose. The broader issues of governmental misconduct, of Miller's reputation in the community at large or of the morality of the conduct in question are seldom involved directly in the trial of a criminal case. Even a defendant who is ultimately found guilty has the right to proclaim his or her innocence or decry the Government's misconduct in the court of public opinion. The First Amendment prohibits courts from applying the rules of the judicial courtroom to this public

forum unless the standards of Nebraska Press are employed and enforced.

II

THE SIX CATEGORIES OF ATTORNEY COMMENTS SUGGESTED BY THE NINTH CIRCUIT AS PROPER SUBJECTS OF ATTORNEY "GAG" ORDERS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND CANNOT SERVE AS THE BASIS FOR A PRIOR RESTRAINT

The Ninth Circuit's decision authorizes the prohibition of six categories of attorney comments if a "serious and imminent threat to the administration of justice" is shown. These six categories of speech are ostensibly drawn from ethical guidelines which have no binding force whatsoever either in California generally (see State Bar of California Formal Opinion No. 1983-71) or in the Central District in particular (see Local Rules of Practice for the United States

District Court-Central District of California, Rule 2.5.1 (1984)). Moreover, these disciplinary rules were never intended to be made the basis of a prior restraint punishable by contempt. [cite] There is no factual basis for concluding that attorney comments falling within these ethical guidelines automatically cause "prejudice" in a constitutional sense.

The Ninth Circuit relied upon Standard 8-1.1 of the ABA's Standards for Criminal Justice to identify certain categories of speech which it apparently believes to be appropriate subjects of a revised gag order. Appendix C, at A-71. However, those same ABA standards emphatically provide that "[v]iolation of standard 8-1.1 shall be grounds for judicial and bar disciplinary action" and that "[c]ontempt proceedings are not

appropriate for violations of standard 8-1.1." ABA, Standards for Criminal Justice, Standard 8-1.3 (1982); see also ABA, Standards Relating to Fair Trial and Free Press, § 1.3 (Approved Draft 1968).

The preamble to the ABA's newly-promulgated Model Rules of Professional Conduct likewise makes clear that their sole purpose is: (1) in the case of obligatory ("shall"-type) rules, to "define proper conduct for purposes of professional discipline"; and (2) in the case of rules cast in permissive ("may"-type) language, to "define areas under the Rules in which the lawyer has professional discretion." This preamble goes on to make the following observation:

> "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through

> disciplinary agencies. They are not designed to be a basis for civil liability. . . . The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." [Emphasis added.] Accord ABA, Model Code of Professional Responsibility, Preamble and Preliminary Statement (1978).

Putting aside the inappropriateness of employing non-binding ethical guidelines as a framework for imposing prior restraints on speech, the specific categories of proscribed statements approved by the Ninth Circuit are vague and ambiguous. For example, the fifth and sixth categories of proscribed statements (Appendix C, at A-70) are so vague

and overbroad as to be virtually indistinguishable from the Trial Court's original "gag" order which precluded attorney comment bearing upon the "merits of the case." Statements concerning governmental misconduct in the investigation of a criminal case might well fall within the scope of these proscriptions, yet this is precisely the type of public comment which is entitled to the highest degree of First Amendment protection. Chicago Council of Lawyers, supra, 522 F.2d at 252-253.

The Court's categories are an invitation to the automatic imposition of blanket attorney "gag" orders in any criminal case involving publicity. The trial court accepted this invitation by amending its restraining order to simply repeat verbatim the list of prohibited categories of statements contained in the

Ninth Circuit's decision. See Appendix D. Similar "gag" orders will no doubt follow in other cases. The unavoidable result of such orders is that attorneys will not comment publicly about any aspect of a case they are handling because of the risk of contempt.

III

THE NINTH CIRCUIT'S OPINION DIRECTLY CONTRAVENES THIS COURT'S DECISIONS FINDING THAT THOSE WHO ARE DIRECTLY RESTRAINED BY A CHALLENGED ORDER HAVE STANDING TO ASSERT THE RIGHTS OF THOSE WHO ARE INDIRECTLY AFFECTED BY THE SAME ORDER

In its opinion, the Ninth Circuit perfunctorily cites the general proposition that litigants lack "standing to assert the rights of third parties" and that, though this rule is subject to "several well established exceptions . . ., none of those exceptions apply." Appendix C, at A-45. In fact, however, the Ninth

Circuit's decision directly contravenes this Court's consistent decisions holding that those who are directly impacted by a particular action have standing to assert the rights of those who are indirectly affected by the same action.

In this case, Petitioners themselves are the direct targets of the District Court's restraining order. As such, they are fully entitled to assert the rights of those who are indirectly, yet substantially affected by the order -- i.e., the press and the general public. The Ninth Circuit's opinion studiously avoids any mention of the ways in which the media, in particular, is affected by the challenged order. Yet, as discussed in Section I(C), supra, this "gag" order cannot help but adversely affect the ability of the press to have the kind of access to news which will render it possible for reporters to

present a fair, accurate, objective and responsible account of this trial.[4/] Without such access, the public's right to know what is transpiring will be severely limited. Kleindeinst v. Mandel, supra, 408 U.S. at 762-763. Restrictions such as these hardly foster

4/ Following the Ninth Circuit's decision, the Radio and Television News Association filed its own Petition for Writ of Mandamus challenging the District Court's re-imposed "gag" order. That Petition -- which has yet to be acted upon by the Court of Appeals -- argues persuasively that "personal interviews with trial attorneys offer the only means of directly communicating events at trial" to radio listeners and television viewers. Absent the ability to obtain statements or clarifications from counsel, the RTNA asserts that "it is exceedingly difficult to provide an accurate picture of the story or to provide the in-depth reporting that public interest demands, so that the long-term effect of any gag order will be to restrict broadcast coverage of the Miller spy trial." Radio and Television News Association of Southern California v. United States District Court, Case No. 85-7524, United States Court of Appeals for the Ninth Circuit, Petition for Writ of Mandamus, Joint Declaration of RTNA Board Members, ¶9.

the kind of "marketplace of ideas" which this Court has long recognized to be the cornerstone of the First Amendment. Martin v. Struthers, 319 U.S. 141, 143 (1943); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-296 (1981); see Appendix E, at A-111.

Justice Powell's opinion for the Court in Warth v. Seldin, 422 U.S. 490, 510 (1975) notes with approval that "this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." See, e.g., Doe v. Bolton, 410 U.S. 179, 188, reh. denied, 410 U.S. 959 (1973) (physicians who were neither prosecuted nor threatened with prosecution held to have standing to challenge constitutionality of Georgia abortion statute);

Epperson v. Arkansas, 393 U.S. 97, 100 (1968) (un-charged school teachers confronted with mere "dilemma" have standing to challenge state criminal anti-evolution statute); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (criminally convicted officials of Planned Parenthood League held to have standing to raise the constitutional rights of those married persons with whom they had a professional relationship in challenging constitutionality of statute rendering use of contraceptives a criminal offense).

Following Warth v. Seldin, supra, this Court has repeatedly found that those who themselves are directly affected by a particular restriction have standing under Article III to litigate the rights of those who are only indirectly affected by the restraint. See, e.g., Craig v. Boren, 429 U.S. 190, 195-196 (1976), reh. denied,

429 U.S. 1124 (1977) (vendors of 3.2% beer held to have standing to assert the rights of putative 18-20-year-old male customers in challenging constitutionality of gender-based statutory discrimination scheme); 13 C. Wright, et al., Federal Practice and Procedure, § 3531.9, nn. 24-25, 60-66, 110 (1984); L. Tribe, supra, § 3-26 at 104 and n.12 ("a litigant's claim that complying with a duty imposed upon him would prevent another from exercising a constitutional right [footnote omitted] presents a clearly justiciable issue about the permissibility of the choice government seeks to impose upon the litigant").

In First Amendment litigation, the Supreme Court has long protected the rights of third parties, particularly where, as here (Appendix C, at A-53), the constitutional challenge is founded

at least in part upon principles of overbreadth. See, e.g., Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 81 L.Ed 2d 786, 794-797 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n.11 (1981); see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-757 (1976).

Finally, while the Ninth Circuit cites Duke Power Co., v. Carolina Environmental Steady Group, Inc., 438 U.S. 59 (1978) for the proposition that Petitioners do not have standing to assert the rights of the media's news-getting rights or the access rights of either the press or public (Appendix C, at A-45), Duke Power in fact offers no support for this conclusion. The Duke Power majority concluded that an environmental organization, a labor union

and a number of individuals residing near certain planned nuclear power plants had the requisite standing to challenge the constitutionality of the Price-Anderson Act. Id. at 81. There is nothing in Duke Power which modifies the principles of third-party standing discussed above.

IV

CONCLUSION

The writ should issue.

DATED: January 29, 1986.

Respectfully submitted,

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APPENDIX A

LOS ANGELES, CALIFORNIA; TUESDAY, MARCH 5, 1985; 3:40 P.M.

THE CLERK: Remain seated and come to order.

THE COURT: I'm going to take several minutes here of your time to give you some of my considered thoughts on this matter.

In light of recent statements in the press that have been attributed to counsel for all three of the defendants, this court has been reluctantly forced to reconsider the need for an order restraining extra-judicial statements by the parties and their agents.

After serious consideration of the new evidence and a review of the applicable law, this court believes

that it's appropriate, even mandatory, that it issue such a restraining order.

This court finds the situation significantly different from the primary cases relied upon by the defendants, namely Nebraska Press Association, versus Stuart, 1976 case and CBS, Inc. versus the United States District Court, 729 F.2d 1174 (9th Cir. 1984). 427 U.S. 539.

In this case we are not confronted with extensive pretrial publicity that is adverse to the accused thereby directly implicating the accused's Fifth and Sixth Amendment rights. To the contrary, the thrust of the pretrial publicity here, especially the recent publicity that has occurred as the trail date is practically upon us has been

instigated by counsel for defendants and seriously threatens to bias the jury pool in favor of the defendants.

Moreover, the restraining order sought in this case is not in the nature of the para- -- I never pronounce this word right -- paradigmatic -- I'd say paradigm, but I get mixed up on the "g" -- the classic, I'll use, prior restraints upon the press itself that were at issue in the Nebraska Press Association and CBS.

I think I should repeat that. Moreover, the Restraining order sought in this case is not in the nature of the classic prior restraints upon the press itself as were at issue in Nebraska Press Association and CBS.

The court does not deny that certain first amendment freedoms are at issue here, but it is quite plain that different competing societal interests are at stake here than were at stake in the two cases primarily relied upon by the defendants.

Approximately two months ago this court denied a similar request by the government for such a restraining order. At that time extra-judicial statements had been made by both parties and this court believed that such relief was unwarranted. In part, this court relied upon the ability of searching voir dire and instructions to the jury to erase whatever bias to the jury pool had already occurred.

More importantly, the court made clear that it was placing its confidence and trust in ethical and legal obligations of counsel.

Counsel for defendant Ogorodnikova voiced a different interpretation of these ethical and legal responsibilities, which, quite frankly, caused this court some concern, yet the professionalism exhibited by all counsel over the past couple months appeared in retrospect, apparently misleadingly, to make -- well, I don't have to say apparently -- to make such concern unfounded.

To the court's dismay the publicity surrounding this case has drastically changed at the most critical time period. The justifications for the action taken are

completely unpersuasive. For any of the reasons given, defense counsel could have come to this court first in an effort to resolve the problem.

Moreover, the stated reasons in no way justify the prejudice created. This court is in full agreement with Mr. Bonner's characterization of the reasons offered by defense counsel.

Just last week this court discussed with counsel the voir dire process. All counsel expressed concern for the possible prejudice that pretrial publicity may have caused or will cause and the court agreed with all counsel that a questionnaire should be addressed to that subject as an initial jury screening device.

Unbelievably, just a few days later an article appeared in the press quoting defense counsel and offering what can only be viewed as the most prejudicial publicity that has yet appeared on the case.

The apparent hypocrisy evident in this aberrant behavior of defense counsel deserves no further comment at this point.

The more important revelation arising from counsel's inconsistent conduct is its unquestionable indication of an interpretation of an attorney's responsibilities that will undoubtedly create and has already created a serious and imminent threat to the administration of justice in this case.

This court has the unflagging duty to ensure the fairness of

trails, considered by the Supreme Court to be the most fundamental of all freedoms -- citing Estes vs. Texas, 381 U.S. 532, 540 (1965).

Not only to protect the rights of an accused, but also to protect the rights of the public, a trial judge has the affirmative constitutional duty to minimize the detrimental effects of pretrial publicity upon the potential jury pool, especially when such publicity is part of the conscious design of defense counsel to serve their clients' interest.

Although this court has found that Nebraska Press Association is distinguishable from the case at bar in significant ways, the court will employ the test articulated in that case. Specifically, the court will

examine and make findings concerning (a) the nature and extent of pre-trial news coverage, (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.

The nature and extent of pre-trial news coverage has taken a serious and harmful turn in recent days, the sole cause being statements by defense counsel.

A prototypical example of the type of deleterious publicity that this court has previously admonished defense counsel about appeared in this Sunday's Los Angeles Times.

All defense counsel, with the exception of Mr. Levine, albeit that

Mr. Levine indicates that he did do some of this, too, but they are quoted -- the others are quoted in this article. It stated in the article that interview with Stone and the other attorneys for the Ogorodnikovs and Miller provided a detailed preview of key portions of their defense strategy.

In light of comments made by counsel in the past, it is reasonable to presume that counsel made such comments in furtherance of their zealous representation of their clients and I would add that the comments made today make it just as reasonable.

This court certainly does not disparage the desirability of zealous representation of clients,

but in this instance counsel misconstrue the full extent of their obligations. Besides their obligations to their clients, attorneys have historically been officers of the court and thereby have a legal and ethical responsibility to safeguard the right to a fair trial.

In Re Halkins, 598 F.2d 176 (D.C. Circuit, 1979). This is not to imply, as the court noted in Halkin, that counsel surrender their First Amendment rights at the courthouse door.

However, in view of the comments contained in the Los Angeles Times article, it is plain that the serious and imminent threat to a fair trial outweighs any First Amendment rights at stake. To claim that the need to argue a client's

case in detail in the press on the eve of trial is mandated by an ethical or legal responsibility belittles the government's, the defendants', and most importantly in this instance, the public's right to a fair trial before an unbiased jury.

With the nearness of trial, the potential for prejudice become particularly acute. There's nothing in the Code of Professional Responsibility requiring or even recommending that an attorney argue his or her case in the press or on the courthouse steps.

Neither the press nor the public has the right to hear counsel argue their case prior to this court and the impaneled jury hearing the evidence, when doing so seriously

impedes the fair and effective administration of justice. The integrity of counsel and this court, although perhaps implicated, are immaterial in deciding whether to issue this restraining order.

Instead, it is the integrity of our judicial process that is fundamentally at stake. This trial will not become a circus show performed outside the courtroom, yet defense counsel's actions clearly foreshadow such an eventuality if this court does not take this action.

Thus, the nature of the pretrial publicity in this instance must be considered in light of the source of such publicity and the motivation for such publicity, both of which I've already detailed.

However, the extent of such publicity in its prejudicial potential is of necessity speculative and I use that term because I have a cite in the Nebraska Press Association case 427 U.S. 563. Nontheless, based upon the details contained within the Los Angeles Times article, which this court is in no position to assess the veracity of and the motivations behind the article, this court finds it quite reasonable to expect that such publicity has been and will become even more pervasive, creating in effect a lobbying effort by counsel on behalf of their clients. The public has a right to expect a fairer trial that that.

Next the court turns to whether other measures would be likely to

mitigate the effects of unrestrained pretrial publicity. Initially, the court notes that the restraining order which this court intends to issue has received judicial support as a less drastic alternative to a prior restraint on the press itself.

As if addressing the issue presented to this court, the Supreme Court stated in Sheppard vs. Maxwell, 384 U.S. 33 (1966):

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for ""defense -- "defendants, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation but is

highly censurable and worthy of disciplinary measures."

Furthermore, in describing measures short of prior restraints on publication that may be utilized by a trial court, the Supreme Court in Nebraska Press Association included the possibility that, quotes, "Trial courts in appropriate cases may limit what the contending lawyers, police and witnesses may say to anyone." 427 U.S. at 564. Also the Ninth Court has endorsed such a restraining order in appropriate situations. In Farr vs. Pitchess at 522 F.2d 469 (1975) the Ninth Circuit stated.

> "In a criminal case the trial judge has a duty and obligation to attempt to protect the rights of defendants to a fair trial, free of adverse publicity. Where the case is a notorious one, that burden on the court is heavy.

> The most practical and recommended procedure to ensure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial."

The statement should apply -- and this is -- I'm finished with the quote -- the statement should apply with equal force to the public's right to a fair trial, especially when counsel for the defendants make lobbying efforts on behalf of their clients at a critical time in the case and with no reasonable need to balance the information provided to the public or neutralize statements made by the prosecution.

Foir dire clearly does not provide an adequate alternative in

the face of such prejudicial comments emanating from defense counsel. As observed by the Seventh Circuit, "Attorneys' statements are often the source of prejudicial publicity, especially since their views and comments are usually accepted by the public on the basis that they come from a wellspring of reliable information." I'll cite the Chicago Council of Lawyers vs. Bauer, 522 F.2d 422 at 250 (1975).

It is ironic that this Court addresses this restraining order issue on the same day that it receives a suggested voir dire questionnaire addressed to pretrial publicity. It is not in the parties' interest or in the interest of justice to exclude from the jury all citizens who read the Los

Angeles Times or who otherwise keep abreast of current events.

Moreover, counsels' misinterpretation of their obligations indicates that such prejudicial extrajudicial comments will continue during trial and voir dire is powerless to neutralize such prejudicial publicity.

Alternatives such as a change of venue or postponement will not be in the interest of justice, either. Here the problem is with curbing unwarranted statements by counsel, and a change of venue or postponement would simply have no effect on the problem.

Similarly, emphatic and clear instructions are inadequate. Given no basis for counsels' statements other than inappropriate lobbying on

their clients' behalf, this court should not run the serious and imminent risk that there reasonably -- that is, reasonably anticipated barrage of -- I misread that -- serious and imminent risk that the reasonably anticipated barrage of prejudicial publicity will poison the impartiality of a jury, even with such limiting instructions.

If counsel wish to get their views across to the jurors, they have every opportunity to do so through opening and closing statements, as well as through effective examination of witnesses. Additionally, the same legitimate channels are available to allow the media to inform the public at large.

Finally, sequestration is an undesirable alternative. Jurors, especially in long trials, should not bear the brunt of counsels' transgressions.

Moreover, the resentments and harassments -- and harassment which derives from sequestration can often impede calm and rational deliberation. In this court's judgment, sequestration is a remedy clearly more drastic than the restraining order being issued today.

Finally, this court finds that restraining counsel and their agents from making extra-judicial statements concernirg the case is the most effective and least drastic solution to prevent the dangers inherent in counsels' comments.

Nothing in this order will proscribe the press from reporting events that transpire in the court-room, nor does the restraining order prohibit comment by the news media.

Furthermore, any denial of First Amendment rights such a restraining order may entail is not absolute but only temporary and short-lived, at that.

Trial is almost upon us and as previously stated, the structure of a trial allows counsel to express their views about evidence and the merits of the case at length. The substance of the charges at stake in this case are wrought with the potential for unfair prejudice, and this court has the obligation to ensure through the least drastic

means available that the adjudication of the issues takes place in an unbiased climate.

At this time counsels' statements are the primary impediment to this goal, and the court takes what action it believes is mandated.

Therefore, the court having found a serious and imminent threat to the administration of justice in this case, it is hereby ordered that all attorneys in this case, all parties and all their representatives and agents of counsel and the parties shall not make any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury.

This order shall remain in force during the pendency of this

action or until further order of this court. No person covered by this order shall avoid its effects by indirectly but deliberately taking actions which bring about a violation of this order.

And I should include in that order witnesses, too. This court feels -- and I do. This court feels duty-bound in issuing such an order and will feel equally duty-bound in enforcing such order in the case of its violation.

The reporter's transcript will serve as the order and findings of this court. Copies will be provided to counsel as soon as practical.

Counsel are ordered to instruct all persons covered by this order of the court's ruling.

The court stands in recess.

(End of proceedings.)

APPENDIX B

LOS ANGELES, CALIFORNIA; TUESDAY,

JUNE 11, 1985; 2:15 P.M.

(Proceedings in open court; jury not present:)

THE COURT: Good afternoon, everyone.

Before we get into the scheduled and unscheduled business, at least officially on schedule, as some of you already know about, I am going to read the following order:

The Court on its own motion has reconsidered the restraining order issued in this case a few months ago. The factors underlying that order are subject to change over the course of time.

It is the Court's belief that conditions, as they presently exist,

do not justify a restraining order being imposed upon witnesses and defendants.

Thus, the restraining order is modified to eliminate these individuals from the perview of the order.

The Court's belief that continued instructions to the Ogorodnikovs here in searching voir dire to the prospective Miller jurors should eliminate any prejudice that may ensue from the publicity emanating from the witnesses and the defendants.

The Court did not modify the restraining order insofar as it currently applies to counsel.

The reasons for restraining counsel were articulated when the Court issued the restraining order.

However, the Court wishes to again make clear it considers attorneys to be in a unique situation, being advocates for their clients, individuals entitled to their First Amendment rights, and officers of the court and all at the same time.

Given the clear showing that prejudice for a fair trial was the foundation for the Court's imposition of the restraining order and the Court's inability to adequately control such prejudice, the balancing of these various rules of an attorney and the right to a fair trial require the restraining order that has been issued in this case, except as is amended by this order.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL LEVINE, et al.,	)	No. 85-7208
Petitioners,	)	D.C. No. 84-972-DVK
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	OPINION
Respondent,	)	
UNITED STATES OF AMERICA,	)	
Real Party in Interest.	)	

Emergency Petition for Writ
of Mandamus to the
United States District Court
for the
Central District of California
The Honorable David V. Kenyon,
District Judge, Presiding
Submitted--May 20, 1985
Filed--June 24, 1985
Amended--August 19, 1985

Before: SNEED, NELSON and BEEZER,

Circuit Judges.

BEEZER, Circuit Judge:

Richard W. Miller and his attorneys, Stanley I. Greenberg and Joel Levine, seek a writ of mandamus compelling the district court to dissolve a restraining order that prohibits the attorneys involved in Miller's trial from communicating with the media regarding the merits of the case. To determine the validity of the order, we must address the clash between the basic and fundamental right to a fair criminal jury trial and the first amendment right of attorneys to engage in free speech.

I

BACKGROUND

On October 2, 1984, Richard W. Miller, a former special agent with

the Federal Bureau of Investigation, was arrested and charged with espionage. Miller allegedly passed classified documents to Svetlana Ogorodnikova and Nikolay Ogorodnikov, who were also charged with espionage. An indictment was returned naming all three defendants on October 12. A superseding indictment was returned in November. On January 22, 1985, the district court severed the trial of Miller from the trial of the Ogorodnikovs. The trial of the Ogorodnikovs is currently proceeding, while Miller is still awaiting trial.

The criminal proceedings against Miller have received extensive local and national media coverage. Early in the proceedings, the district court become aware that

both government officials and defense attorneys had engaged in "on the record" interviews with media representatives. In early November 1984, the district court admonished counsel not to engage in pretrial publicity. On November 28, the government sought an order that would specifically proscribe the making of any extrajudicial statement to the press concerning matters related to the prospective trial of the defendants. The motion was denied on December 14, but the district court again admonished counsel to maintain an atmosphere in which a fair trial could be conducted. The court sought the cooperation of counsel. Defense counsel advised the court that they might "at some future time

deem it necessary in the interest of our client to make a statement outside the courtroom."

Shortly before the beginning of the Ogorodnikovs' trial, the Los Angeles Times published an article by staff writer William Overend that quoted numerous statements attributed to defense attorneys. Lawyers Contend FBI Exaggerated Evidence in Spy Case, L.A. Times, Mar. 3, 1985, pt. 1, at 3. The article summarized the attorneys' statements as follows:

> Defense lawyers in the Richard W. Miller spy case have accused the FBI of initially exaggerating the evidence against Miller and two Russian emigres charged with conspiring to pass secret government documents to the Soviet Union.
>
> They said in interviews last week that the three accused spies should never have been prosecuted for espionage because the government has been

unable to establish that Miller actually passed any documents to Svetlana Ogorodnikova or her husband, Nikolai Ogorodnikov, or caused any harm to the security interests of the United States.

A federal prosecutor declined to respond to the comments on grounds that a judge has asked all parties in the case to avoid public discussion of the evidence.

Initially, the attorneys focused on the prosecution's decision to drop four counts of aiding and abetting espionage against the Ogorodnikovs:

"The dismissal of these charges means the government has now conceded that no documents were ever passed. It's also a concession that there's been no damage to national security," said Gregory P. Stone, one of Ogorodnikova's lawyers.

"I don't think the case should ever have been brought. The initial characterization by the government that this was a major espionage case with untold damage was an incorrect assessment."

> "They acted hastily in filing the espionage charges," added Stanley Greenberg, one of Miller's lawyers. "To a large extent, the FBI misled the U.S. attorney's office about the strength of the case until it was too late."

The attorneys then set forth the defense theory in great detail. Finally, they attacked the basis of the prosecution's case:

> Greenberg, joining the criticism of the initial FBI reaction to Miller's activities, said Miller's comments were the "sole basis" for initially charging the Ogorodnikovs with receiving secret documents.
>
> "Those two people were indicted with the hope that the charges could be substantiated, and they haven't been able to do it," Greenberg said. "The only reason Miller is still charged with passing documents is that he admitted it after five days of questioning, and he'd already told them he'd say anything just to end the questioning.
>
> "If he had admitted passing pumpkin papers from the Alger Hiss case, I think he'd

be charged with it," Greenberg added.

. . . .

"We've got two dummies here, no question about that," [Greenberg] said. "But these people should have never been taken seriously as spies. It's unrealistic to talk about the Miller case in the same breath as other espionage cases that have come along in the last few years."

. . . .

[Randy Sue] Pollock, representing Nikolai Ogorodnikov, agreed with the other defense lawyers that the government's case against all three defendants appeared weaker than originally presented. She added that the case against her client was regarded by all of the defense lawyers as the weakest of all.

"He's not involved in this thing. None of us understand why he was indicted," she said. . .

In response to the Los Angeles Times article, the government filed an ex parte application

to renew its motion for a restraining order regarding extrajudicial statements. A hearing was held on March 5, 1985. At the hearing, Levine acknowledged that he had spoken to Overend, although the article did not quote him. After reviewing the statements of counsel in that article, the district court ordered:

> [T]hat all attorneys in this case, all parties and all their representatives and agents of counsel and the parties shall not make any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury.
>
> This order shall remain in force during the pendency of this action or until further order of this court. No person covered by this order shall avoid its effects by indirectly but deliberately taking actions which bring about a violation of the order.

> And I should include in that order witnesses, too . . . and I do.

On June 11, 1985, the district court removed the parties and witnesses from the scope of the order. The revised order applies only to the attorneys for the government and the defendants.

The Ogorodnikovs, their attorneys, and the various media organizations that may be affected by the order are not parties to this proceeding. Miller has remained in custody since his arrest in October 1984. While in custody, he has been denied any contact with media representatives. During the Ogorodnikovs' trial, however, Miller testified in open court pursuant to

a grant of limited immunity.[1/] Levine and Greenberg will represent Miller in his jury trial before the district court.

1/ Under the facts of this case, we reject the argument that a restraining order against Miller's attorneys prevents Miller from communicating with the media. By testifying at the Ogorodnikovs' trial, Miller was able to communicate his version of the events in question to the media. We also note that the district court's order does not prevent Miller from issuing a statement to the media through his family members. Finally, we observe that the restraining order only limits extrajudicial statements by Miller's attorneys. Miller's attorneys are free to present Miller's case in open court. Accordingly, we need not decide whether a restraining order against defense attorneys is permissible when the defendant cannot communicate with the media.

We also note that the present petition does not challenge the government's ability to deny Miller direct contact with the media. Cf. Houchins v. KQED, Inc., 438 U.S. 1 (1978); Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975).

II

JURISDICTION

We have jurisdiction to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Nevertheless, mandamus is an extraordinary remedy that is employed only in extreme situations. Clorox Corp. v. United States District Court, 756 F.2d 699, 700 (9th Cir. 1985). In Bauman v. United States District Court, we set forth five guidelines for determining the appropriateness of issuing a writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a

> matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

557 F.2d 650, 654-55 (9th Cir. 1977) (citations omitted). The first two Bauman guidelines support an exercise of our mandamus jurisdiction. See CBS, Inc. v. United States District Court, 729 F.2d 1174, 1177-78 & n.2 (9th Cir. 1984); Rendleman, Free Press-Fair Trial: Review of Silence Orders, 52 N.C.L. Rev. 127 (1973). The fourth Bauman guideline does not apply in this case. The fifth Bauman guideline is also inapplicable in light of the numerous prior decisions in this circuit and in other jurisdictions. Accordingly, the third Bauman

guideline is critical. A simple showing of error will not satisfy this guideline. See Town of North Bonneville v. United States District Court, 732 F.2d 747, 750 (9th Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1173 (9th Cir. 1982). We have held that an order is "clearly erroneous as a matter of law" if we are left with the definite and firm conviction that a mistake has been committed. United States v. Harper, 729 F.2d 1216, 1222 (9th Cir. 1984). With that standard in mind, we turn to the merits of the petitioners' claims.

III

FREEDOM OF THE PRESS

The petitioners seek to characterize the district court's order

as an unlawful prior restraint on the press. We have invalidated prior restraints on the reporting of events relating to a criminal proceeding. E.g., CBS, 729 F.2d at 1178-79; see Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); ABA Standards for Criminal Justice Standard 8-3.1 (1982). We have also invalidated restraints on the access of the media to criminal proceedings. Associated Press v. United States District Court, 705 F.2d 1143, 1145-47 (9th Cir. 1983); see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). The restraint that the district court issued is different from the restraints that we considered in CBS and Associated Press. The district court's order neither

denies the media access to any criminal proceeding nor bars the media from disseminating any information that it obtains. On the contrary, the media is free to attend all of the formal proceedings before the district court and to report anything that happens. See Sack, Principle and Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 411, 427-28 (1977) (noting the "fundamental difference" between a restraining order against the press and a restraining order against trial participants); cf. In re Halkin, 598 F.2d 176, 195 & n.44 (D.C. Cir. 1979) (noting that an order directed only against lawyers and litigants is less drastic than restraining the press).

The district court's order raises a freedom of the press issue that is analytically distinct from the issues that were raised in Associated Press and CBS. By effectively denying the media access to the litigants, the district court's order raises an issue under the first amendment by impairing the media's ability to gather news. See Branzburg v. Hayes, 408 U.S. 665, 681 (1972); M. Nimmer, Nimmer on Freedom of Speech § 4.09[B] (1984). But see KPNX Broadcasting Co. v. Superior Court, 139 Ariz. 246, 678 P.2d 431, 439-42 (1984) (holding that limitations on the media's ability to interview trial participants do not violate the first amendment). The petitioners argue that the district

court's order constitutes an unconstitutional restraint on the media's ability to gather news.

We note, however, that none of the media organizations that could be affected by the district court's order have joined this action. In general, a party lacks standing to assert the rights of third parties. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80 (1978); Warth v. Seldin, 422 U.S. 490, 499 (1975); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531.9 (1984). The rule against third party standing is subject to several well-established exceptions. See id. Under the present procedural posture of this case, none of those exceptions apply.

Accordingly, we conclude that the petitioners lack standing to assert the constitutional rights of non-party media organizations.

IV

FREEDOM OF SPEECH

A. The Appropriate Legal Standard

The petitioners contend that the district court's order is a prior restraint on their first amendment right to free speech. We agree that the district court's order is properly characterized as a prior restraint. See M. Nimmer, supra, § 4.03. Prior restraints are subject to strict scrutiny because of the peculiar dangers presented by such restraints. See id. § 4.04; L. Tribe, American Constitutional Law § 12-32 (1978). Accordingly, the

district court's order may be upheld only if the government establishes that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978); see Wood v. Georgia, 370 U.S. 375, 383-85 (1962); (2) the order is narrowly drawn, Carroll v President and Commissioners of Princess Anne, 393 U.S. 175, 183-84 (1968); Halkin, 598 F.2d at 193-94; Sherman, 581 F.2d at 1361; and (3) less restrictive alternatives are not available, Nebraska Press Association, 427 U.S. at 563; CBS, 739 F.2d at 1182-83.

We note that the district court's order applies only to trial

participants. The Supreme Court has suggested that it is appropriate to impose greater restrictions on the free speech rights of trial participants than on rights of non-participants. Sheppard v. Maxwell, 384 U.S. 333, 360-63 (1966); see Nebraska Press Association, 427 U.S. at 564. The case for restraints on trial participants is especially strong with respect to attorneys. Justice Brennan analyzed the role of attorneys in this context as follows:

> As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases and to impose suitable limitations whose transgression

could result in disciplinary proceedings.

Nebraska Press Association, 427 U.S. at 601 n.27 (Brennan, J., concurring) (citation omitted).[2/] We recognize that attorneys and other trial participants do not lose

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2/ DR 7-107 of the Model Code of Professional Responsibility places specific limitations on extrajudicial statements by attorneys. See also Model Rules of Professional Conduct Rule 3.6 (1983); ABA Standards for Criminal Justice Standard 8-1.1 (1982). Several courts have held that attorney discipline is appropriate under DR 7-107 if there is a reasonable likelihood of prejudice to a fair trial. E.g., Hirschkop v. Snead, 594 F.2d 356, 365-70 (4th Cir. 1979) (en banc); In re Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982). A few courts have required either a serious and imminent threat to the administration of justice or a clear and present danger. E.g., Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976). But cf. Note, A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation, 65 Cornell L.Rev. 1106 (1980) (arguing

their constitutional rights at the courthouse door. See L. Tribe, supra, § 12-11, at 627 n.26; Freedman & Starwood, Prior

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that the difference between the two standards is not constitutionally significant).

California has not adopted DR 7-107. In the context of an attorney's violation of a restraining order, however, a contempt conviction was evaluated under the "reasonable likelihood" standard. Younger v. Smith, 30 Cal.App.3d 138, 163, 106 Cal.Rptr. 225, 242 (1973); see also Press-Enterprise Co. v. Superior Court, 37 Cal.3d 772, 691 P.2d 1026, 1032, 209 Cal.Rptr. 360, 366 (1984) (applying the "reasonable likelihood of substantial prejudice" standard in deciding whether to allow media access to preliminary hearing transcripts).

The Central District of California has not adopted a local rule to deal specifically with extrajudicial statements. Cf. C.D.Cal.R. 2.5.2 ("No attorney shall engage in any conduct which degrades or impugns the integrity of this Court or in any manner interferes with the administration of justice therein."). We note that other districts have adopted such rules. E.g., N.D.Cal.R. 130-2 (repealed 1983).

Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 614-18 (1977). Nevertheless, we must analyze the district court's order in light of the relationship between the petitioners and the court system.

We also note that several other courts have considered similar restraining orders. The overwhelming majority of those courts have upheld the restraining orders. E.g., In re Russell, 726 F.2d 1007 (4th Cir.), cert. denied, 105 S.Ct. 134 (1984); In re San Juan Star Co., 662 F.2d 108, 113-18 (1st Cir. 1981); United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969);

Central South Carolina Chapter, Society of Professional Journalists v. Martin, 431 F.Supp. 1182 (D.S.C.), aff'd in part, 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978); KPNX Broadcasting Co., 678 P.2d at 439-42; State ex rel. Angel v. Woodahl, 171 Mont. 13, 555 P.2d 501, 504 (1976); Houston Chronicle Publishing Co. v. Hardy, 678 S.W.2d 495 (Tex. Civ. App. 1984), cert. denied, 105 S.Ct. 1754 (1985); see also United States v. Schiavo, 504 F.2d 1, 6 (3d Cir.) (en banc) (dictum in plurality opinion), cert. denied, 419 U.S. 1096 (1974). In dictum, we have encouraged the use of such orders. Farr v. Pitchess, 522 F.2d 464, 468-69 (9th Cir. 1975), cert. denied, 427 U.S.

912 (1976). We are aware of only two cases in which restraining orders against trial participants were invalidated. In both cases, the court focused on the inadequacy of the district court's findings and the overbreadth of the restraint. Halkin, 598 F.2d at 196-97; Chase v. Robson, 435 F.2d 1059, 1061-62 (7th Cir. 1970) (per curiam). In light of this backdrop, we now turn to an examination of the district court's order.

B. The Existence of a Serious and Imminent Threat to the Administration of Justice

The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . " A criminal defendant's

right to a fair trial is an essential part of our system of justice. Nebraska Press Association, 427 U.S. at 551. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court placed the burden on the trial court to insure that media coverage does not affect the fairness of the proceeding. The Court stated:

> [T]here is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior the trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceeding threatens the fairness of a trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that

> will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Id. at 362-63; see Nebraska Press Association, 427 U.S. at 551-55. We have recognized that the Sheppard Court unequivocally imposed a duty upon trial courts to take affirmative steps to insure the fairness of a criminal proceeding in the face of excessive publicity. Farr, 522 F.2d at 468; see also Hirschkop, 594 F.2d at 366 n.8 (noting that the language in Sheppard "is more nearly directive than suggestive").

The sixth amendment is a limitation on the government and does not give the prosecution the right to a fair trial. See CBS, 729 F.2d at 1184 (Goodwin, J., concurring). It does not follow, however, that

the need to restrict publicity is lessened when the publicity is caused by the actions of the defense, rather than the prosecution. We must consider the fundamental interest of the government and the public in insuring the integrity of the judicial process. Society has the right to expect that the judicial system will be fair and impartial to all who come before it. Tijerina, 412 F.2d at 666; cf. Mapp v. Ohio, 367 U.S. 643, 659 (1961) (basing the existence of the exclusionary rule, in part, on "'the imperative of judicial integrity'") (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). As the Tenth Circuit noted, "The public has an overriding interest that justice be done in a controversy between the

government and individuals and has the right to demand and expect 'fair trials designed to end in just judgements.'" Tijerina, 412 F.2d at 666 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)). The mere fact that a threat to the integrity of the judicial process is created by a private litigant, rather than by the government, is of little consequence. See Chicago Council of Lawyers, 522 F.2d at 254 (noting that "the Government is entitled to a fair trial"); United States v. Mandel, 408 F.Supp. 673, 677 (D. Md. 1975). The potential for injury to the integrity of the judicial process is significant in cases involving trial publicity. As the Supreme Court has noted, "The theory of our system is that the conclu-

sions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907) (per Holmes, J.); see Estes v. Texas, 381 U.S. 532, 540 (1965). This objective can be obtained only if publicity created by private litigants is subject to reasonable restrictions.

We do not mean to imply that the government has an absolute right to an impartial jury. Indeed, it is appropriate for the defense, within certain limits, to seek a jury that is partial to the defendant. The ability of the defendant to seek a partial jury must be limited, how-

ever, by the legitimate expectation of the government and the public that the judicial system will produce fair results. Accordingly, the judiciary cannot escape the task of fixing the limits within which a defendant may attempt to create publicity.

The district court based its decision to issue the restraining order on the existence of a serious and imminent threat to the administration of justice. The district court entered the following oral findings:

> [I]n view of the comments contained in the Los Angeles Times article, it is plain that the serious and imminent threat to a fair trial outweighs any First Amendment rights at stake. To claim that the need to argue a client's case in detail in the press on the eve of trial is mandated by an ethical or legal responsibility belittles the government's, the

defendants', and most importantly in this instance, the public's right to a fair trial before an unbiased jury.

With the nearness of trial, the potential for prejudice becomes particularly acute. There's nothing in the Code of Professional Responsibility requiring or even recommending that an attorney argue his or her case in the press or on the courthouse steps.

Neither the press nor the public has the right to hear counsel argue their case prior to this court and the impaneled jury hearing the evidence, when doing so seriously impedes the fair and effective administration of justice. . . .

Instead, it is the integrity of our judicial process that is fundamentally at stake. This trial will not become a circus show performed outside the courtroom, yet defense counsel's actions clearly foreshadow such an eventuality if this court does not take action.

. . . .

However, the extent of such publicity in its prejudicial potential is of necessity speculative . . . Non-

> theless [sic], based upon the details contained within the Los Angeles Times article, which this court is in no position to assess the veracity of and the motivations behind the article, this court finds it quite reasonable to expect that such publicity has been and will become even more pervasive, creating in effect a lobbying effort by counsel on behalf of their clients. The public has a right to expect a fairer trial than that.

The petitioners contend that the district court's findings were both inadequate and unsupported by the record.

Initially, the petitioners argue that the district court's order can be upheld only if the government has shown that an impartial jury cannot be selected. In two recent decisions, we invalidated prior restraints on the ground that it was inconceivable that pretrial publicity in Los

Angeles could prevent the selection of an impartial jury. CBS, 729 F.2d at 1179-82 (invalidating an order restraining CBS from broadcasting a government surveillance tape prior to trial); Associated Press, 705 F.2d at 1146 (invalidating an order closing pretrial proceedings). In CBS and Associated Press, we relied on language from Nebraska Press Association, indicating that the size of the jury pool was a crucial consideration. 427 U.S. at 563-65 (invalidating a pretrial order restraining the media from reporting facts detrimental to the defendant). Unlike Nebraska Press Association, CBS, and Associated Press, this case does not involve an order aimed solely at curbing pretrial publicity. Instead, the district court's

order was aimed expressly at publicity during, or immediately before, trial. As the district court noted, this type of publicity has a greater potential for prejudice than publicity months in advance of trial. See United States v. Coast of Maine Lobster Co., 538 F.2d 899, 902 (1st Cir. 1976); Chicago Council of Lawyers, 522 F.2d at 253. Even if an impartial jury could be selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences. More importantly, the circus-like environment that surrounds highly publicized trials threatens the integrity of the judicial system. See Sheppard, 384 U.S. at 342-49

(describing the circus-like environment surrounding the Sheppard trial). Accordingly, the district court's conclusion that publicity posed a serious and imminent threat to the administration of justice was appropriate.

The petitioners also argue that the district court overstated the amount of publicity involved in the case. We disagree. While we have focused on the article in the Los Angeles Times, it is apparent that this case has received widespread publicity. The district court found that the level of publicity would increase as the trial approached. We conclude that the district court's findings in this regard were appropriate. See Nebraska Press Association, 427 U.S. at 562-63

("Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial.").

Finally, we must determine whether the extrajudicial statements by trial participants are the cause of prejudicial publicity. Both the Supreme Court and this court has recognized the effectiveness of restraining orders against trial participants. Nebraska Press Association, 427 U.S. at 564; Farr, 522 F.2d at 468-69; cf. Freedman & Starwood, supra, at 610-13 (arguing

that the language in Nebraska Press Association should be viewed as dictum). Moreover, the district court found that extrajudicial statements by attorneys threatened to create extensive prejudicial publicity. Accordingly, we conclude that the district court properly found that its order would be effective.

In sum, we conclude that the record supports the district court's conclusion that the activity restrained poses a serious and imminent threat to the administration of justice.

C. The Narrowness of the Order

The district court's order bars trial participants from making "any statements to members of the news media concerning any aspect of this

case that bears upon the merits to be resolved by the jury." While the order is not expressly limited to extrajudicial statements, the district court had noted that the attorneys could communicate their views to the media "through opening and closing statements, as well as through effective examination of witnesses." The petitioners contend that the order is both vague and overbroad.

We do not agree that the order is vague. A restraining order is unconstitutionally vague if it fails to give clear guidance regarding the types of speech for which an individual may be punished. See Smith v. Goguen, 415 U.S. 566, 572-73 (1974); J. Nowak, R. Rotunda & J. Young, Constitutional Law

871-72 (2d ed. 1983). Applying that standard, we conclude that the order is not unconstitutionally vague. Cf. Hirschkop, 594 F.2d at 371 (holding that "other matters that are reasonably likely to interfere with a fair trial" is too vague).

We conclude, however, that the order is overbroad. It is apparent that many statements that bear "upon the merits to be resolved by the jury" present no danger to the administration of justice. See Halkin, 598 F.2d at 196-97 & n.51. After the filing of this opinion, the district court must determine which types of extrajudicial statements pose a serious and imminent threat to the administration of justice in this case. The district court then must fashion an

order specifying the proscribed types of statements. With regard to statements by the prosecution, it would be appropriate for the district court to order the government to observe the self-imposed limitations set forth in 28 C.F.R. § 50.2(b) (1984). With regard to statements by the defense, it would be appropriate to proscribe statements relating to one or more of the following subjects:

(1) The character, credibility, or reputation of a party;

(2) The identity of a witness or the expected testimony of a party or a witness;

(3) The contents of any pretrial confession, admission, or statement given

by a defendant or that person's refusal or failure to make a statement;

(4) The identity or nature of physical evidence expected to be presented or the absence of such physical evidence;

(5) The strengths or weaknesses of the case of either party; and

(6) Any other information the lawyer knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

See also Model Rules of Professional Conduct, Rule 3.6 (1983);

ABA Standards for Criminal Justice Standard 8-1.1 (1982); Model Code of Professional Responsibility DR 7-107 (1979).

D. The Availability of Less Restrictive Alternatives

In its oral order, the district court considered and rejected several alternatives to a restraining order. The petitioners challenge the district court's findings regarding each alternative.

1. Voir Dire

In Nebraska Press Association, the Court suggested that "searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence" would be an appropriate alternative to a restraining order.

427 U.S. at 564. The district court rejected that alternative in this case:

> Foir [sic] dire clearly does not provide an adequate alternative in the face of such prejudicial comments emanating from defense counsel. As observed by the Seventh Circuit, "Attorneys' statements are often the source of prejudicial publicity, especially since their views and comments are usually accepted by the public on the basis that they come from a wellspring of reliable information." [Chicago Council of Lawyers, 522 F.2d at 250.]
>
> It is ironic that this court addresses this restraining order issue on the same dav that it receives a suggested voir dire questionnaire addressed to pretrial publicity. It is not in the parties' interest or in the interest of justice to exclude from the jury all citizens who read the Los Angeles Times or who otherwise keep abreast of current events.
>
> Moreover, counsels' misinterpretation of their obligations indicates that such prejudicial extrajudicial comments will continue during

> trial and voir dire is powerless to neutralize such prejudicial publicity.

The petitioners argue that searching voir dire would eliminate any bias caused by pretrial publicity. While that may be true, we agree with the district court that voir dire cannot eliminate prejudice caused by publicity during the trial. Moreover, voir dire cannot alleviate the harm to the integrity of the judicial process caused by the extrajudicial statements of trial participants.

2. Instructions

In Nebraska Press Association, the Court also suggested "the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence

presented in open court." 427 U.S. at 564. The district court rejected this alternative:

> [E]mphatic and clear instructions are inadequate. Given no basis for counsels' statements other than inappropriate lobbying on their clients' behalf, this court should not run the . . . serious and imminent risk that the reasonably anticipated barrage of prejudicial publicity will poison the impartiality of a jury, even with such limiting instructions.

The petitioners challenge the district court's finding solely on the ground that nothing in the record proves that the jurors would not abide by such instructions. We recognize, however, that jury instructions are often an ineffective remedy. See, e.g., Silverthorne v. United States, 400 F.2d 627, 643 (9th Cir. 1968); Isaacson, Fair Trial and Free

Press: An Opportunity for Coexistence, 29 Stan. L. Rev. 561, 566-67 (1977). The district court's finding that such instructions would be inadequate is not baseless. Moreover, we note that jury instructions cannot address the threat to judicial integrity posed by prejudicial extrajudicial statements.

3. Change of Venue or Postponement

The Nebraska Press Association Court also suggested change of trial venue and postponement of the trial date as alternatives to a restraining order. 427 U.S. at 563-64. The district court rejected those alternatives because "[h]ere the problem is with curbing unwarranted statements by counsel, and a change of venue or postponement would

simply have no effect on the problem." We agree. A change of venue would be appropriate if the publicity surrounding a trial is centered on a specific geographical location. A postponement would be appropriate if the publicity is temporary. This case presents neither situation.

4. Sequestration

The Nebraska Press Association Court noted that sequestration of jurors is always an alternative. 427 U.S. at 564. The district court rejected that alternative:

> [S]equestration is an undesirable alternative. Jurors, especially in long trials, should not bear the brunt of counsels' transgressions.
>
> Moreover, the resentments and . . . harassment which derives from sequestration can often impede calm and rational deliberation. In this court's

> judgment, sequestration is a remedy clearly more drastic than the restraining order being issued today.

The negative effects of sequestration are well documented. E.g., J. Van Dyke, Jury Selection Procedures 181-83 (1977). We conclude that the district court properly rejected this alternative.

5. Summary

The various alternatives to a restraining order would be either ineffective or counterproductive. A restraining order on trial participants, however, is a highly effective remedy for excessive trial publicity. In Sheppard, the Court stated:

> Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming

> under the jurisdiction of the court should be permitted to frustrate [the court's] function [in insuring a fair trial]. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

384 U.S. at 363. In Farr, we endorsed the remedy employed by the district court:

> In a criminal case the trial judge has a duty and obligation to attempt to protect the right of the defendants to a fair trial, free of adverse publicity. Where the case is a notorious one, that burden on the court is heavy. The most practical and recommended procedure to insure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial.

522 F.2d at 468. We conclude that the district court's choice of remedy was appropriate.[3/]

V

CONCLUSION

The petition for a writ of mandamus is granted. The district court is directed to define the scope of the restraining order in accordance with this opinion. This panel shall retain jurisdiction over any subsequent petitions for writs of mandamus arising out of the restraining order at issue in this case. The mandate shall issue forthwith.

It is so ordered.

3/ We reject the petitioners' argument that the government has "unclean hands." See Sheppard, 384 U.S. at 359 n.13.

SNEED, Circuit Judge, Concurring:

I concur in Judge Beezer's opinion. I write separately only to express a slightly different approach to gag orders than that of Judge Beezer.

My starting point is that the conduct of lawyers should eliminate the necessity of imposing such orders. Respect for their profession and the integrity of the judicial process should be sufficient to deter the type of conduct that makes gag orders directed at lawyers necessary. Unfortunately, this required level of professional conduct sometimes does not exist. Bar associations appear to be incapable of securing it.

This requires, inter alia, confrontation with the tension between the interests served by the First and Sixth Amendments. Properly imposed gag orders do inhibit the flow of information available to the press even when not specifically directed at the press. On the other hand, it is presumed that such orders do tend to assure an impartial jury.

The difficulties attending the drafting and enforcing of proper gag orders, which in part this case illustrates, tempts one to consider the consequences of severely restricting or even eliminating their use. Juries time and time again surprise us with their ability and willingness to penetrate the confusion created by counsel, both

within and without the courtroom, witnesses, the press, and, one must add, the very language and forms of the law itself. Their verdicts generally are fair. Thus, it can be argued that there is no need to shelter jurors from what the press reports about the statements of counsel before and during the trial. Some might go further and insist that jurors should be totally immersed in the community environment until discharged in order to reflect properly community values.

Any inclination to accept unqualifiedly these positions is checked by the Sixth Amendment's guarantee to an accused of an impartial jury. Prosecutorial freedom to communicate as it wishes with the press both before and

during trial would make it very difficult in an emotional setting to assure the impartiality of a jury. At the very least we are sufficiently doubtful of that ability to be willing to unleash prosecutors completely. As a consequence, we applaud the rules imposed by the Department of Justice under which prosecutorial contacts with the press are governed. See 28 C.F.R. § 50.2 (1985). Were they not in place the courts would evolve similar restraints. First Amendment concerns would not prevent their development and use.

The Sixth Amendment's guarantee of an impartial jury, however, is an obligation of the nation, not the accused. It is not his duty to provide an impartial jury. Indeed,

we recognize, at least implicitly, that an accused, within certain limits, can attempt to obtain a jury that is partial to him. Lawyers frequently describe what in essence is the search for a partial jury as only a quest for an impartial one. This sort of dissembling usually is relatively harmless. It becomes more troubling when the accused in his understandably zealous search for a partial jury insists that the Sixth Amendment, reinforced by the First Amendment, provides a protective immunity over a wide range of activities that have as their purpose the attainment of such a jury. Neither amendment, however, assures the accused a partial jury. He may attempt to obtain one, but he is not guaranteed one.

Courts, therefore, cannot escape the task of fixing the limits within which the accused legitimately may seek a jury partial to his interests. Intimidation, threats, and other forms of duress obviously are not immunized by either the First or the Sixth Amendment. Broadly speaking, the issue before us in this case is whether the "lobbying efforts" by the attorneys of those here accused of espionage as reflected by the record before us could transgress these limits. I am prepared to accept the conclusion that they could.

In reaching that conclusion, I must point out, as does Judge Beezer, that although the Sixth Amendment does not guarantee that

the people of this nation will witness a fair trial before an impartial jury, the people expect such a trial. Moreover, the court should make a reasonable effort to provide precisely what the people expect. In doing so, it must not confuse that expectation with a public lust for a verdict of guilty.

Evenhanded treatment of the prosecutor and defense counsel no doubt tends to reinforce the public's perception that the trial is fair. Evenhandedness, however, it not required by the Sixth Amendment. Prosecutors may be subjected in gag orders to more stringent restraints than are defense counsel. The balance here is between the right of the accused to an impartial jury and the expecta-

tion of the people that the jury is impartial. If evenhandedness is to be put aside, it is the accused that must be favored. The ideal, of course, is a fair trial before an impartial jury. A properly limited gag order directed at prosecutors and defense counsel can be helpful in achieving this end.

Speech by those parties, to repeat, can destroy the impartiality of a jury and make a fair trial impossible. It happens infrequently, but it is possible. The result may favor the accused or the state. It is a result that cannot be avoided by muzzling the press in advance of the trial. See C.B.S. v. United States District Court for the Central District of California, 729 F.2d 1174 (9th Cir. 1983);

Associated Press v. United States District Court for the Central District of California, 705 F.2d 1143 (9th Cir. 1983). Gag orders, such as here involved, present the issue whether the speech of attorneys can be restrained to reduce the risk of elimination by the press of the possibility of a fair trial before an impartial jury. The Supreme Court has told us that courts can restrain such speech. See Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); Sheppard v. Maxwell, 384 U.S. 333, 358-62 (1966). The restraint, however, must be precisely drawn. Judge Beezer clearly has indicated how this should be accomplished.

The balance that should be struck is between First Amendment

rights, the Sixth Amendment rights of the accused, and the public's expectation that the trial will be fair and before an impartial jury. This sort of delicate balancing should be undertaken reluctantly; but when provoked by attorneys, whether prosecutors or defenders, who seek by use of the press to obtain as partial a jury as possible, courts must respond.

Levine v. United States District Court for the Central District of California, No. 85-7208

NELSON, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IVA of Judge Beezer's opinion, and agree that the writ of mandamus should be granted. Also, like Judge Sneed, I find much to agree with in the remainder of the opinion. I cannot fully concur, however, because I do not believe that the record reflects an adequate showing of a "clear and present danger or a serious and imminent threat" to the empaneling of an impartial jury in this case. See United States v. Sherman, 581 F.2d 1358, 1361 (9th

Cir. 1978). Thus, the district court's order does not meet the first prong of the test articulated in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), which is set forth in Judge Beezer's opinion. See CBS, Inc. v. United States District Court, 729 F.2d 1174, 1178-82 (9th Cir. 1984). For this reason I cannot on this record subscribe to Judge Beezer's apparent approval of a revised form of prior restraint order.

As we all recognize, this case involves striking a delicate balance between rights guaranteed by the First and Sixth Amendments. Prior precedents tell us, however, that these rights are not to be weighed equally when a prior restraint is involved. Prior restraints on free

speech are subject to strict scrutiny and may be upheld, if at all, only in extraordinary circumstances. See CBS, 729 F.2d at 1183. There is a "heavy presumption against [the] constitutional validity" of a prior restraint. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Thus, it is not enough for a court to decide that the fair trial right may be affected by the exercise of free speech. Nor is it enough for us to conclude, as we could here, that the prior restraint has a rational basis.

Instead, we must apply an "enormously exacting" standard. CBS, 729 F.2d at 1178. As we said in CBS,

> Only if it is "clear . . further publicity, unchecked,

> would so distort the views of potential jurors that 12 c[an] not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court" can an appellate court even consider upholding a prior restraint.

Id. (quoting Nebraska Press, 427 U.S. at 569).

The district court's focus, then, should be on the impact of the pretrial publicity rather than its source. The court should consider the possibility that pretrial publicity may prejudice the "entire community." CBS, 729 F.2d at 1180. In the context of this case, this possibility will probably be remote. As we noted in CBS, "the courts have long held that in a large metropolitan area, prejudicial publicity is less likely to endanger" the right to a fair trial. Id. at 1181.

With a population of about 12 million in the Central District of California, it should be possible to find an adequate number of unbiased jurors even in the face of the most pervasive publicity. See id. at 1181-82. Indeed, in Nebraska Press the Court suggested that a pool of 80,000 prospective jurors might be sufficiently large to protect against prejudicial publicity. Nebraska Press, 427 U.S. 539, 563 n.7 (cited in CBS, 729 F.2d at 1182). In short, the record before us does not, in my opinion, support adequately the issuance of the district court's order.

I do not mean to suggest that an order restricting attorneys' statements to the press will never be permissible in this particular

case. Once the jury is empaneled, the district court will be faced with a different situation. Even then, however, the court must examine closely the alternatives to issuance of an order restricting speech. The viability of jury sequestration, curative jury instructions, and other potential remedies must be re-examined in light of the degree and nature of publicity at that time. The court should also examine whether any proposed order will be effective in curbing prejudicial publicity. Cf. Associated Press v. United States District Court, 705 F.2d 1143, 1146 (9th Cir. 1983) (in striking down court-ordered sealing of documents, appellate court found that there was not "a substantial probability that

closure will be effective in protecting against the perceived harm," citing United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982)). Publicity in this case is likely to be widespread even if the district court restricts attorneys' comments to the press. The court should consider seriously whether the benefits to the Sixth Amendment will outweigh the costs to the First before resorting to a prior restraint on speech.

I sympathize with Judge Kenyon's concerns about the professional duty of lawyers to refrain from engaging in publicity campaigns which may tend to threaten the orderly administration of justice. One would hope that rules governing such conduct would emanate first

from the bar, lessening or eliminating the need for courts to consider imposing prior restraints on speech. The enforcement of relevant rules of professional conduct would of course be after-the-fact remedies, admittedly less effective but far safer than prior restraints. Concern over the professional ethics of those who would try their cases in the press, however, should not replace dispassionate analysis when First Amendment freedoms are in the balance.

In summary, I agree with my colleagues that the writ should be granted. On this record I do not believe that a prior restraint can be justified by the requisite "clear and present danger" or "serious and

imminent threat" to Sixth Amendment rights.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	No. CR 84-972(A)-KN
Plaintiff,	)	
vs.	)	AMENDED RESTRAINING ORDER
RICHARD W. MILLER,	)	
Defendant.	)	

Filed -- July 23, 1985

The Court, in the continuing process of evaluating the restraining order imposed upon counsel in this case, and having considered the arguments of counsel offered at the recent hearing, hereby supplements its findings and modifies the restraining order in the following respect:

The article appearing in the March 3, 1985 edition of the Los

Angeles Times was clearly a catalyst in the issuance of the restraining order, but the importance of this article to the Court's ruling can be misconstrued if not considered in light of the history of the case. Unquestionably, the content and timing of the article presented serious consequences for the fairness of the imminent trial of Svetlana Ogorodnikova and Nikolai Ogorodnikov. But this article carried much more dangerous implications, which can only be understood in the context of prior comments by counsel to the media and the Court. For example, counsel for Richard W. Miller described the case as follows:

> Did you ever read that old comic strip in Mad Magazine called Spy Vs. Spy? That's

what this case amounts to. It's a spoof on real spies. Furthermore, counsel for Miller apparently told media representatives the following statements after learning that a superseding indictment alleged new counts against his client:

> It's like accusing Jack the Ripper of littering. They are determined to convict this guy of something, and it's not going to be espionage charges. It simply proves what we've been saying all along, and that is that the FBI's charges are a joke. A month ago, he was accused of espionage, one of the most serious charges possible. Now they accuse him of the equivalent of stealing paper clips from the office.

Moreover, publicity harmful to a fair trial was not simply a one-sided affair. Government representatives described Miller's alleged conduct as "an aberration on the proud record of patriotic and dedicated service of thousands of

[FBI] special agents throughout our history." Another example of harmful publicity generated by the Government included the following: "When you consider that the FBI has thousands of employees, every now and then a rotten apple is bound to show up." In early November 1984, this Court considered the above comments and several similar comments by defense counsel and Government representatives which had been reported in the electronic and print media. Recognizing the extraordinary nature of a restraining order, this Court chose the less drastic alternative of admonishing counsel. In late November 1984, the Government filed a motion to impose a restraining order on extrajudicial statements to the press. Once

again, this Court chose admonishment and appealed to counsel's obligations to our system of justice. At this time, however, counsel made it clear that, notwithstanding this Court's admonishments, they would be obligated to make extrajudicial statements if they interpreted their clients' interests as so demanding. Apparently, defense counsel construed this obligation zealously to represent their clients as mandating the statements made to Los Angeles Times reporter William Overend in the article of March 3, 1985. As such, this Court viewed the statements made in this article as a precursor to similar conduct on the eve of and throughout the two trials. To prevent deleterious repercussions on the fairness of the

trials, this Court construed its own obligation as requiring the imposition of a restraining order on counsel. Nothing has occurred subsequent to the imposition of the restraining order to indicate that counsel for Miller construe their obligations as attorneys in a manner different from that reflected in the history of this case leading up to the March 3, 1985 article. A serious and imminent threat to the administration of justice still exists.

In light of the persuasive guidance provided by the Ninth Circuit in its decision of June 24, 1985, the Court does, however, modify its restraining order to provide more specific guidelines for counsel to follow. Specifically,

counsel shall not make extrajudicial statements to members of the news media relating to one or more of the following subject:

(1) The character, credibility, or reputation of a party;

(2) The identity of a witness or the expected testimony of a party or a witness;

(3) The contents of any pretrial confession, admission, or statement given by a defendant or that person's refusal or failure to make a statement;

(4) The identity or nature of physical evidence expected to be presented or the absence of such physical evidence;

(5) The strengths or weaknesses of the case of either party; and

(6) Any other information the lawyer knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

IT IS SO ORDERED.

DATED: July 23, 1985.

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL LEVINE, et al., Petitioners, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	C.A. No. 85-7208 D.C. No. 84-972-DVK ORDER

Filed -- November 1, 1985

Before: SNEED, NELSON and BEEZER, Circuit Judges.

Judges Sneed and Beezer have voted to deny the petition for rehearing and to reject the petitioners' suggestion for rehearing en banc. Judge Nelson would grant

the petition for rehearing and approve the petitioners' suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing. A vote has been taken, and has failed to receive a majority of votes in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Levine v. United States District Court

NORRIS, J., dissenting:

I regret that a majority of our active judges have failed to vote to rehear this case en banc. The case raises an extraordinarily important constitutional issue: to what extent does the First Amendment limit the authority of trial judges to restrain the extra-judicial comments of criminal defendants and their lawyers? In the absence of controlling Supreme Court precedent, the decision in this case -- the first from any circuit to approve a gag order on defense attorneys under the "clear and present danger" standard -- is likely to have a broad impact on the freedom of

expression of trial participants throughout the nation. Moreover, the decision will significantly restrict the media's ability to gather information and the public's right to be informed about our criminal justice system. Finally, I agree with Judge Nelson that the decision cannot be reconciled with the Supreme Court's decision in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), and this court's decisions in CBS, Inc. v United States District Court, 729 F.2d 1174 (9th Cir. 1984), and Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983). See Levine v. United States District Court, 764 F.2d 590, 603-04 (Nelson,

J., concurring in part, dissenting in part).

The district court's gag order in this case was largely in response to a single article published on March 3, 1985, in the Los Angeles Times. That article was based upon statements attributed to defense lawyers charging that the FBI had exaggerated the evidence against their clients. These statements were made in response to allegations made by the government, both in a formal indictment and in extra-judicial statements charging the client with espionage. Just as the government was levelling its charges in the public forum, so too was the defense being presented in the marketplace of ideas.

Implicit in Judge Beezer's majority and Judge Sneed's concurring opinions is that there is something improper and perhaps even unethical about a lawyer who refuses to limit his client's defense to in-court statements. This, I submit, is a myopic view of the role of a lawyer when he is carrying out what may be the noblest calling of our profession, representing a person charged by the state with a crime. As Judge Hand once observed, "indictments are calamities to honest men." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). When, as in this case, the indictment is the subject of great public interest, the damage to the accused's reputation and the accompanying emotional distress can be

greatly magnified. Under circumstances such as these, I agree with President (then Congressman) Buchanan's statement -- made at the impeachment trial of Judge Peck, who had jailed a lawyer because of his criticism of the judge -- that it is "the imperative duty of an attorney to protect the interests of his client out of court as well as in court." A. Stansbury, Report of the Trial of James H. Peck 455 (1833). The range of options available to the lawyer must include speaking out publicly to mitigate the damage to the client in the eyes of the community at large. Marshalled against an accused is not only the awesome resources and prestige of the United States Government, but also the power of the

media to disseminate the government's charges. I cannot accept the proposition that a person charged by his government with a crime should be denied the opportunity to defend himself publicly through his chosen spokesman. Suppose, for example, the accused wishes to charge that the indictment was politically or religiously motivated. The freedom to make such a charge against the state is surely paramount among the freedoms protected by the First Amendment. To deprive an accused of his most valuable resource in criticizing the government -- his lawyer -- is to restrict, and restrict severely, his First Amendment rights.

Because of my profound concerns about the adverse consequences of

this decision, including its chilling effect on lawyers called upon to represent unpopular defendants in high visibility cases, I dissent from the order rejecting the suggestion for rehearing the case en banc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL LEVINE, STANLEY I. GREENBERG, and RICHARD MILLER,	)	No. 85-7208
	)	DC# CR 84-972(A)-Kn
Petitioners,	)	
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	
Respondent,	)	ORDER
and	)	
UNITED STATES OF AMERICA,	)	
Real Party in Interest.	)	

Filed -- November 12, 1985

Before: NORRIS, Circuit Judge.

The dissent to the November 1, 1985 order denying the petition for rehearing is amended to include the names of Judges Pregerson, Ferguson, Nelson and Reinhardt, who have joined in it.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL LEVINE, STANLEY I. GREENBERG, and RICHARD MILLER,	)	No. 85-7208
Petitioners,	)	DC# CR 84-972(a)-Kn
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	
Respondent.	)	ORDER
UNITED STATES OF AMERICA,	)	
Real Party in Interest.	)	

Filed -- December 10, 1985

Before: NORRIS, Circuit Judge.

The dissent to the November 1, 1985 order denying the petition for rehearing is amended to

include the attached dissent of Judge Pregerson.

Levine v. United States District Court, No. 85-7208

PREGERSON J., dissenting:

I join Judge Norris' dissent. I believe that respect for the right of free speech, and faith in the ability of an American jury to arrive impartially at a just verdict based solely on the evidence presented in court, counsel against the issuance of "gag orders."

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, January 29, 1986, I served the within PETITION FOR WRIT OF CERTIORARI in re: "Joel Levine, Stanley I. Greenberg and Richard Miller vs. United States District Court, Central District of California/United States of America" in the Supreme Court of the United States October Term, 1985, No..... on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

HON. DAVID KENYON, United States District Court, 312 North Spring St., Los Angeles, CA 90012;

ROBERT C. BONNER, United States Attorney, RICHARD B. KENDALL, Assistant U.S. Attorney, 312 North Spring St., Los Angeles, CA 90012;

UNITED STATES COURT OF APPEALS, For the Ninth Cicuit, U.S. Court of Appeals & Post Office Building, 7th & Mission Sts., Post Office Box 547, San Francisco, CA 94101; (1 copy)

REX E. LEE, SOLICITOR GENERAL, U.S. Department of Justice, Washington, D.C. 20530;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on January 29, 1986
at Los Angeles, California.

Kathleen Kolterback

Supreme Court, U.S.
FILED
MAY 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1291

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOEL LEVINE, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an order restraining the lawyers in a federal criminal trial from making public statements regarding the case violates the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1291

JOEL LEVINE, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A28-A98) is reported at 764 F.2d 590. The opinion and order of the district court as amended (Pet. App. A1-A27, A99-A106) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1985 and amended on August 19, 1985. A petition for rehearing was denied on November 1, 1985 (Pet. App. A107-A108). The petition for a writ of certiorari was filed on January 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 2, 1984, petitioner Miller, then a special agent with the Federal Bureau of Investigation (FBI), was

arrested and charged with espionage. On October 12, 1984, a grand jury sitting in the Central District of California returned an indictment charging Miller and co-defendants Svetlana Ogorodnikova and Nikolay Ogorodnikov with conspiring to commit espionage.[1] Pet. App. A29-A30. In particular, the indictment alleged that Miller provided the Ogorodnikovs with classified FBI information and documents for transmission to Soviet agents, and that on one occasion Miller accompanied Ogorodnikova to San Francisco, California, where she delivered classified documents to officials at the Soviet consulate.

Both the national and local press covered the criminal proceedings against Miller extensively. Pet. App. A30. Early in the proceedings, the district court learned that government officials and defense attorneys both had engaged in interviews "for attribution" with press representatives.[2] On November 6, 1984, the district court admonished the parties to "try the case here [in court] and nowhere

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[1]A superseding indictment was returned in November 1984 (Pet. App. A30).

[2]For example, on October 3, 1984, the day after Miller was arrested, the FBI in Washington issued a press release that included a statement from FBI Director William Webster describing Miller's conduct as "an aberration on the proud record of patriotic and dedicated service of thousands of [FBI] special agents throughout our history." Pet. App. A101-A102. Separately, during a press conference on another subject, Attorney General William French Smith commented briefly on Miller's arrest, stating that "[w]hen you consider that the FBI has thousands of employees, every now and then a rotten apple is bound to show up" (*id.* at A102). At the same time, the United States Attorney for the Central District of California and the Special Agent in Charge of the Los Angeles FBI office conducted a press conference at which they made available the lengthy affidavit of FBI Agent P. Bryce Christensen, which supported the government's criminal complaint.

At the time petitioners Levine and Greenberg were retained to represent Miller, shortly after the return of the initial indictment, Greenberg told a *Los Angeles Times* reporter that Miller's situation was analogous to "that old comic strip in Mad Magazine called Spy Vs. Spy[]"

else" and to refrain from making extrajudicial comments likely to result in pretrial publicity. Pet. App. A31; Gov't Motion for Restraining Order (Gov't Motion) 16, ¶ 5, *United States* v. *Miller*, Cr. 84-972(A)-Kn (C.D. Cal. filed Nov. 28, 1984).

One week later, following the return of the superseding indictment, the *Los Angeles Times* reported another interview with petitioner Greenberg, one of Miller's defense attorneys. Greenberg was quoted as stating that the government's decision to drop two charges and add others was evidence of its determination to " 'convict this guy of something[.] * * * It simply proves what we've been saying all along, and that is that the FBI's charges are a joke.' " Pet. App. A101; Gov't Motion 18.

Because defense counsel continued to make statements about the case to reporters, sometimes meeting them on the courthouse steps, the government sought an order restraining the parties, counsel and their agents from publicly commenting on the case during the pendency of the action. On December 14, 1984, the district court denied the motion. While the district judge concluded that he had the authority to enter such an order, he declined to do so because trial counsel had shown a willingness to cooperate with the court's informal request to refrain from making statements to the press. Pet. App. A31; Gov't Ex Parte Application to Renew Motion for Restraining Order (Gov't Renewed Motion), Exh. 1, at 9-10, *United States* v. *Miller*, Cr.

(Pet. App. A100). Greenberg stated that Miller, who had been assigned to foreign counter-intelligence matters, had been attempting to snare the Ogorodnikovs when he himself was arrested. Greenberg also disputed other matters alleged in Agent Christensen's affidavit and the indictment. See Gov't Motion for Restraining Order 19, *United States* v. *Miller*, Cr. 84-972(A)-Kn (C.D. Cal. filed Nov. 28, 1984); Pet. 7. According to the newspaper account, FBI officials declined to comment on Greenberg's statements.

84-972(A)-Kn (C.D. Cal. filed Mar. 4, 1985). In response to the statement of one of Ogorodnikova's lawyers that the defense attorneys might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom," the district judge observed that "[t]he role of the lawyer * * * is to promote a side in the courtroom and not to be a publicity person for someone." In the trial judge's view, talking to the press about the case could only amount to an attempt "to persuade the potential trier of fact" outside the courtroom; the judge expressed the view that any attempt by counsel "to try and create an atmosphere in which a fair trial cannot be had, for either side," was professionally unethical. Pet. App. A31-A32; Gov't Renewed Motion, Exh. 1, at 9, 12-14.

On January 22, 1985, the district court severed the trials of Miller and the Ogorodnikovs and, at the defendants' request, ordered the Ogorodnikovs' trial to precede Miller's. On March 3, 1985, sixteen days before jurors were scheduled to appear for selection for the Ogorodnikov trial, the *Los Angeles Times* published an article containing extensive statements attributed to defense counsel, including Greenberg. Pet. App. A32-A35; Gov't Renewed Motion, Exh. 2. The lawyers' comments focused on the prosecution's decision to drop four counts of aiding and abetting espionage against the Ogorodnikovs; one of Ogorodnikova's lawyers commented that the dismissal means "the government has now conceded that no documents were ever passed" (Pet. App. A33). Remarking on the government's motives in bringing the case against Miller, Greenberg was quoted as asserting that "the FBI misled the U.S. attorney's office about the strength of the case until it was too late" (*id.* at A34). The defense attorneys also provided a detailed account of the defendants' theory of the case, including descriptions of the testimony expected from certain defense witnesses. See *id.* at A32-A35. According to the newspaper

account, "[a] federal prosecutor declined to respond to the comments on grounds that a judge has asked all parties in the case to avoid public discussion of the evidence" (*id.* at A33).

2. After the appearance of the March 3 *Los Angeles Times* article, the government renewed its application for an order restraining extrajudicial statements. Pet. App. A35-A36. At a March 5, 1985, hearing on the motion, the district court expressed "dismay" at the level of publicity (*id.* at A5) in the case and rejected as "completely unpersuasive" the justifications offered by the defense attorneys for their decision to speak to the press (*id.* at A6).[3] The court also found that "the recent publicity that has occurred as the [trial] date is practically upon us has been instigated by counsel for defendants and seriously threatens to bias the jury pool" (*id.* at A2-A3), thus "creat[ing] a serious and imminent threat to the administration of justice in this case" (*id.* at A7). And the court noted its "affirmative constitutional duty to minimize the detrimental effects of pretrial publicity upon the potential jury pool" (*id.* at A8).

In determining whether these circumstances justified judicial action, the court explained that a restraining order imposed upon trial participants differs in kind from a prior restraint imposed directly on the press, of the sort that was at issue in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) (Pet. App. A3). The court nevertheless decided to apply the stringent test set out in *Nebraska Press Ass'n* (Pet. App. A8-A9). In doing so, the court found that the level of publicity about the Miller case presented a "serious and imminent threat" to "a fair trial before an unbiased jury"

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[3]Defense counsel asserted that they had made their public statements to rebut alleged inaccuracies in a New York newspaper account (Tr. 5, 9). None of the comments made to the *Los Angeles Times*, however, addressed the subjects of the alleged inaccuracies.

(*id.* at A11-A12), a problem that was compounded by the imminence of trial (*id.* at A12). Relying on *Nebraska Press Ass'n* and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the district court also found that prophylactic measures short of a restraining order would not adequately counteract the prejudicial effects of pervasive pretrial publicity (Pet. App. A14-A21).[4]

The court accordingly concluded that "restraining counsel and their agents from making extra-judicial statements concerning the case is the most effective and least drastic solution to prevent the dangers inherent in counsels' comments" (Pet. App. A21). The court therefore ordered the attorneys and their agents to refrain from making "any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury" (*id.* at A23).[5]

3. On April 12, 1985, six weeks after the restraining order was issued, petitioners sought a writ of mandamus to compel the district court to dissolve the restraining order. The

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[4]The court explained that the use of voir dire to exclude biased jurors would be ineffective (Pet. App. A17-A18), particularly given the defense attorneys' assertion that they were ethically obligated to generate pretrial publicity favorable to their clients; the attorneys' position meant that, absent measures by the court to curb comments by counsel, "prejudicial extrajudicial comments [would] continue during trial and voir dire is powerless to neutralize such prejudicial publicity" (*id.* at A19). Similarly, the court found that a change of venue or postponement would not obviate the problem because "[h]ere the problem is with curbing unwarranted statements by counsel, and a change of venue or postponement would simply have no effect on the problem" (*ibid.*). And the court concluded that jury instructions would be inadequate to assure a fair trial, finding that "the reasonably anticipated barrage of prejudicial publicity will poison the impartiality of a jury, even with such limiting instructions" (*id.* at A20).

[5]In its original form, the district court's order also restrained the parties and witnesses from making public statements about the case (Pet. App. A23-A24). The court subsequently modified the order sua sponte to exclude these persons from its reach (*id.* at A26).

court of appeals granted the petition for mandamus and directed the district court to define the scope of its restraining order more narrowly (Pet. App. A28-A98).

At the outset, the court of appeals noted that the district court's order "neither denies the media access to any criminal proceeding nor bars the media from disseminating any information that it obtains" (Pet. App. A42-A43).[6] The court concluded, however, that the order amounted to a prior restraint on petitioners' speech (*id.* at A46), and that it could be upheld only upon a showing that (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available (*id.* at A47).

Citing *Nebraska Press Ass'n, Sheppard*, and decisions from other circuits, the court of appeals found that the district court's order largely satisfied that test (Pet. App. A48-A53). The court affirmed the district judge's finding that pretrial publicity in this case posed "a serious and imminent threat to the administration of justice" (*id.* at A59), noting that "[e]ven if an impartial jury could be

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[6]The court of appeals left open the question whether the restraining order violated "the first amendment by impairing the media's ability to gather news" (Pet. App. A44); the court noted that "none of the media organizations that could be affected by the district court's order have joined this action" (*id.* at A45), and it held that petitioners lacked standing to challenge an asserted infringement of the press's rights. The Radio and Television News Association of Southern California (RTNA) subsequently sought a writ of mandamus from the court of appeals challenging the order. On February 10, 1986, the court of appeals denied that application. *Radio & Television News Ass'n* v. *United States District Court*, 781 F.2d 1443 (9th Cir.). The court of appeals reasoned that because the district court's order restricts trial counsel and not the press, RTNA's right to gather and disseminate news has not been restrained. The court of appeals also held that the public has no First Amendment right to hear from trial participants.

selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences" (*id.* at A63; see *id.* at A64-A66). The court of appeals also affirmed the conclusion that less restrictive prophylactic alternatives would be insufficient to ensure the integrity of the judicial process (*id.* at A71-A79).

Although the court of appeals found a restraining order to be justified in this case, it held that the district court's order was overbroad. The court concluded that many statements bearing upon the merits of the case, which would be barred by the district court's order, would pose no threat to the administration of justice (Pet. App. A68). The court of appeals therefore directed the district court to narrow its restraining order in accordance with the appellate court's opinion (*id.* at A79).

In fashioning a narrow order, the court of appeals suggested, the district court should consider holding the government to the limitations on extrajudicial comments imposed by 28 C.F.R. 50.2(b). As for defense counsel, the court listed six categories of statements that might appropriately be proscribed: those relating to (1) the character, credibility, or reputation of a party; (2) the identity or expected testimony of a witness or party; (3) the contents of any pretrial statement; (4) the nature of physical evidence; (5) the strengths or weaknesses of either party's case; and (6) any other information that the lawyer knows to be inadmissible as evidence that would create a substantial risk of prejudice if disclosed. Pet. App. A69-A70. The court of appeals directed the district court, on remand, to fashion an order specifying the proscribed types of statements (*id.* at A68-A69, A79).[7] The district court has since entered such

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[7]Judge Sneed concurred, emphasizing that "the conduct of lawyers should eliminate the necessity of imposing [restraining] orders" (Pet. App. A80). Judge Nelson concurred in part and dissented in part; she accepted the court's statement of the applicable legal standard, but

an order, limiting the prohibitions of the restraining order to the six specific categories of statements listed by the court of appeals (*id.* at A99-A106).[8]

ARGUMENT

1. Petitioners' principal contention (Pet. 24-35) appears to be that the court of appeals' decision cannot be reconciled with *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976). In fact, however, this case involves a restraining order that is wholly different in nature from the one at issue

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concluded that the record here does not "reflect[] an adequate showing of a 'clear and present danger or a serious and imminent threat' to the empaneling of an impartial jury in this case" to justify the issuance of a restraining order (*id.* at A90).

[8]The Ogorodnikovs' trial began in April 1985. They pleaded guilty some two months later. Jury selection for Miller's trial began on July 26, 1985; the court declared a mistrial on November 6, 1985, when the jury was unable to reach a verdict. Jury selection for Miller's second trial began on February 13, 1986, and the trial is now underway. We note that the restraining order will expire upon the termination of trial (see Pet. App. A23-A24), and that petitioners' challenge to the order will, at that point, become moot. Petitioners cannot bring themselves within the "capable of repetition, yet evading review" exception to the mootness doctrine. To do so, they would have to demonstrate not only that the challenged order was too short in duration to be fully litigated prior to its termination, but also that there is "a reasonable expectation that the *same complaining party* [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (emphasis added). Petitioners, however, have not suggested that they regularly are subjected to restraining orders by federal district courts, and they have offered nothing to demonstrate "a 'reasonable expectation' or a 'demonstrated probability' " that they will be involved in the "same controversy" in the future. *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). *Nebraska Press Ass'n* does not lead to a different conclusion; there, the Court found it likely that the same dispute would arise in the future between the state and the press. 427 U.S. at 546-547; see *Murphy*, 455 U.S. at 483 & n.8. Representatives of the press, however, are not parties to this action, so the possibility that the press may have cause to complain of restraining orders against other lawyers in other criminal cases in the future cannot be invoked to avoid a finding of mootness upon the conclusion of Miller's trial.

in *Nebraska Press Ass'n*. There, the Court set aside an order that directly restrained the press from publishing trial-related materials, noting that challenges to prior restraints of that sort present the most compelling First Amendment claims. See 427 U.S. at 556-560. Here, in contrast—as both courts below took pains to explain—the order at issue imposes restraints only on certain of the trial participants. It leaves the press free to publish whatever information it obtains. See *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978) (opinion of Burger, C.J.); *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974).

This Court's decisions leave little doubt that trial judges have the authority to issue such limited restraining orders when necessary to guarantee the integrity of the judicial process. In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), for example, where the Court reversed a conviction that had been tainted by extensive extrajudicial publicity, the Court found it "obvious that the judge should have * * * impos[ed] control over the statements made to the news media by counsel" (*id.* at 360). See *id.* at 359. The Court suggested that the trial court "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." The "control of these sources," the Court stated, was "concededly within the [trial] court's power" (*id.* at 361). Indeed, the Court concluded that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures" (*id.* at 363).

Similarly, in *Nebraska Press Ass'n* itself, the Court reaffirmed *Sheppard*'s conclusions on this point (427 U.S. at 553-554, 564), and cited with approval the recommendations of bar association groups "that trial courts in appropriate cases limit what the contending lawyers, the police,

and witnesses may say to anyone" (*id.* at 564).[9] In his concurring opinion, Justice Brennan made the same point even more explicitly:

> As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U.S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings.

Nebraska Press Ass'n, 427 U.S. at 601 n.27 (Brennan, J., concurring in the judgment).

Contrary to petitioners' contentions (Pet. 16, 28), every court of appeals that has considered the question also has upheld the authority of trial courts to impose restraints on statements by trial participants when necessary to ensure a fair trial. See *In re Russell*, 726 F.2d 1007 (4th Cir. 1984), cert. denied, No. 83-6543 (Oct. 1, 1984) (reasonable expectation of inflammatory and prejudicial statements from potential witnesses justified order restraining them from discussing proposed trial testimony with press); *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (approving bar

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[9]Petitioners, citing 427 U.S. at 564 n.8, suggest (Pet. 26) that the Court in *Nebraska Press Ass'n* left open the question whether courts have the authority to impose restraints on lawyers in criminal cases. In fact, the Court simply declined to discuss the question whether such restraints implicate the First Amendment rights of the press. The Court nowhere suggested that the constitutional rights of trial participants may be infringed when the participants are subjected to restraints such as the ones imposed in this case.

association ethical rules and local district court rules forbidding lawyer contacts with the press that pose a " 'serious and imminent threat' " of interference with a fair trial); *Farr* v. *Pitchess*, 522 F.2d 464, 468-469 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (acknowledging authority of district courts to restrict extrajudicial speech of parties, lawyers, and court personnel); *United States* v. *Schiavo*, 504 F.2d 1, 6 (3d Cir.) (en banc), cert. denied, 419 U.S. 1096 (1974)(same); *United States* v. *Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969) (affirming criminal contempt conviction for violation of an order restraining defendants from making extrajudicial comments about their case where the order was based on a reasonable likelihood of interference with a fair trial). Cf. *In re San Juan Star Co.*, 662 F.2d 108, 113-118 (1st Cir. 1981) (upholding a protective order in a civil case forbidding disclosure of deposition evidence to members of press or public because prejudicial publicity might make empaneling of an impartial jury impossible); *United States* v. *Norris*, 780 F.2d 1207, 1211-1212 (5th Cir. 1986) (affirming conviction over defendant's claim that he was prejudiced by an order prohibiting public comment by trial participants).[10]

2. Petitioners' complaints here are particularly unpersuasive in light of the extraordinary measures the lower courts took to narrow the scope of the restraining order. Despite their observations that the challenged order did not impose a restraint on the press, both courts below chose to safeguard petitioners' rights by applying the stringent *Nebraska Press Ass'n* test. While petitioners appear to

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[10]Petitioners' contention (Pet. 33) that the court of appeals' ruling conflicts with *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir. 1970), is without merit. *Chase* simply held that a particular restraining order was overbroad and not supported by the record. See *id.* at 1061. Implicit in the decision was the conclusion that an appropriately limited order would be constitutional. That conclusion was confirmed by the Seventh Circuit's subsequent decision in *Chicago Council of Lawyers*.

acknowledge this point (Pet. 20), they assert that the courts below erred by failing to make specific findings about the prejudicial effects of pretrial publicity (Pet. 18-19, 22-23, 34-35) and by basing the restraining order on "the mere fact of attorney comments" (Pet. 22).

These assertions are inaccurate. The district court expressly found that the extensive pretrial publicity in this case was threatening "to bias the jury pool" (Pet. App. A2-A3, A6, A9). The district court also found that the anticipated barrage of publicity immediately prior to and during trial would make a fair proceeding impossible (*id.* at A12-A13, A19). And the district court extensively examined the alternatives to a restraining order (*id.* at A14-A22), concluding that none would effectively guarantee a fair trial. That conclusion hardly required speculation on the court's part, as petitioners suggest (Pet. 34-35): defense counsel had announced that they believed themselves to be ethically obligated to generate publicity favorable to their clients (see Pet. App. A5, A10).[11] The court of appeals affirmed each of these specific factual findings by the district court. The record before the district court amply supported those findings, and, in any event, those factual determinations do not warrant review by this Court.

Petitioners' challenge to the six categories of statements that the court of appeals found properly proscribed is similarly without merit. While petitioners maintain (Pet. 51-54) that the court erred by referring to ethical guidelines in developing its standards, this Court has indicated that the

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[11]Petitioners' contention that they had a right and duty to make public statements on behalf of their clients—a claim that they restate before this Court (Pet. 46-50)—has repeatedly been rejected: " 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.' " *Sheppard*, 384 U.S. at 351 (quoting *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907)).

consideration of such guidelines is appropriate in the formulation of orders such as the one at issue here. *Nebraska Press Ass'n*, 427 U.S. at 564 & n.8. Petitioners' further suggestion that the categories are overbroad (Pet. 54-56) simply disregards the court of appeals' efforts to tailor the order narrowly; it is difficult to imagine how the court could have devised more precise standards for "proscrib[ing] extrajudicial statements by any lawyer * * * which divulge[] prejudicial matters." *Sheppard*, 384 U.S. at 361. See *Nebraska Press Ass'n*, 427 U.S. at 601 (Brennan, J., concurring in the judgment).

3. Finally, petitioners maintain that the restraining order in this case impairs the First Amendment rights of the press to gather information (Pet. 36-46) and that they have standing to challenge that impairment (*id.* at 56-59). These contentions were properly rejected by the court of appeals. Even granting petitioners' implausible assertion that the press has a First Amendment right to obtain a particular lawyer's views about the course of an ongoing criminal proceeding, petitioners have no standing to advance such a claim.

The general standing rule articulated by this Court is that, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). While the Court has recognized exceptions to this rule—as the court of appeals recognized (Pet. App. A45)—none of those exceptions is applicable here. There is no legal relationship between petitioners and members of the press. See *Warth*, 422 U.S. at 510. And petitioners have not suggested that members of the press "are disabled from asserting their own right in a proper case" (*ibid.* (footnote omitted)). To the contrary, as is noted above (at note 6, *supra*), the Radio and Television News Association of Southern California

(RTNA) itself sought a writ of mandamus from the court of appeals, arguing that the district court's restraining order violated the First Amendment. That contention was rejected by the court of appeals. *Radio & Television News Ass'n* v. *United States District Court*, 781 F.2d 1443 (9th Cir. 1986). If that ruling is to be challenged in this Court, the challenge should be brought by the RTNA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOEL LEVINE, STANLEY I. GREENBERG AND RICHARD MILLER,

Petitioners,

vs.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, Petitioners Joel Levine, Stanley I. Greenberg and Richard Miller provide a reply brief addressed to the discrete issue first raised by the United States' Brief in Opposition -- i.e., whether Petitioners' challenge to the restraining order imposed by Judge Kenyon in the underlying criminal trial is now, or will become, moot.

ARGUMENT

I

THE QUESTIONS PRESENTED BY PETITIONERS' CHALLENGE TO JUDGE KENYON'S "GAG" ORDER ARE NOT MOOT AND SHOULD BE ADJUDICATED BY THIS COURT

At footnote 8 of its Opposition Brief, the United States argues for the first time that the present Petition should be denied because, at some unknown future date, Petitioners' challenge to Judge Kenyon's restraining order will become moot. This argument is flawed in two respects.

First, the Government concedes that the second trial of Richard Miller is currently underway and understandably expresses no view on its conclusion date (Opp. at 9 n.8). Petitioners Levine and Greenberg have been, are now and will remain subject to Judge Kenyon's "gag" order for the indefinite future.

The duration of this re-trial cannot be predicted with certainty. Nor can anyone predict with confidence that this second trial will not result in another mistrial and a third trial at some future date. What is clear, however, is that this case is not moot at this time.

Second, even if the Miller trial (and Judge Kenyon's order) terminate prior to this Court's review, this action presents a textbook example -- if not an a fortiori application -- of the "capable of repetition, yet evading review" exception to the mootness doctrine. Restraining orders of the type issued by Judge Kenyon will, by definition, always expire upon the termination of the trial in which they are issued. Given the duration of most criminal trials, these orders

will repeatedly evade review by this Court.

Moreover, under the sweeping new standards created by the Ninth Circuit's opinion, restraining orders prohibiting broad categories of extra-judicial comments by criminal defense lawyers may become the rule, rather than the exception. In the case of those lawyers who (like Petitioners Levine and Greenberg) choose to represent unpopular defendants in high visibility cases, the restraining order at issue is a paradigm for applying the "capable of repetition" doctrine. Absent this Court's intervention, the new "guidelines" created by the Ninth Circuit will become a talismanic standard for imposing prior restraints at whim.

Indeed, Judge Kenyon's own response to the Court of Appeals' opin-

ion (Pet., App. D) indicates that district courts will likely adopt, verbatim, the six broad categories of proscribed statements without the slightest regard for findings which justify such drastic and heretofore unprecedented restraints upon lawyers' First Amendment rights. Given their position as prominent criminal defense attorneys practicing in the Central District of California, there is, at minimum, a reasonable probability that Petitioners Levine and Greenberg will again be faced with similar "gag" orders restricting their comments in a controversial criminal trial.

A final aspect of the Government's mootness argument is that, on two occasions, the United States itself delayed this Court's review of Petitioners' challenge to Judge Kenyon's order. The Government twice obtained

extensions of 30 days each within which to file its opposition to this Certiorari Petition. It simply offends notions of basic justice and fair play for the United States to now argue that this Court should dismiss this Petition as moot.

A. Petitioners' Challenge To The Gag Order Presents An Actual Case And Controversy

The second trial of Richard Miller began on February 13, 1986. The defense is currently presenting its case. It is impossible to estimate the duration of this case at this juncture, nor can anyone predict the duration of deliberations once the jury receives its instructions.

Petitioners Levine and Greenberg are each day subject to the restrictions of Judge Kenyon's "gag" order.

By its terms, the order will expire only at the time of final judgment (Pet., App. A23-A24). Though the current trial is likely to end in the next few weeks, the future course of these criminal proceedings and the duration of the challenged restraining order are impossible to predict. The Government's mootness argument is, therefore, premature at best.

B. Even If The Underlying Trial Is Completed Prior To This Court's Review, Petitioners' Challenge Clearly Presents An Issue "Capable Of Repetition, Yet Evading Review"

In the landmark decision of Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515 (1911), this Court recognized an exception to the case and controversy requirement of Article III for cases "capable of repe-

tition, yet evading review." The Southern Pacific Court found jurisdiction proper over a case involving a challenge to an order of the Interstate Commerce Commission despite the fact that the order had expired prior to the Court's review. In so holding, the Court stated: "[T]he questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders capable of repetition, yet evading review . . ." Id. at 515.

In the years since Southern Pacific, this Court has developed a two-part test for applying the "capable of repetition, yet evading review" doctrine. First, the challenged action must be durationally too short to be

fully litigated prior to its cessation or expiration. Second, there must be a reasonable expectation that the same complaining party would be subjected to the same action again. See Sosna v. Iowa, 419 U.S. 393, 400 (1975). Applying these tests, this Court has regularly and frequently declined to hold cases moot despite the fact that the underlying controversies had ended.

In Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179, reh. denied, 410 U.S. 959 (1973), this Court properly rejected suggestions of mootness despite the fact that the pregnant appellants had long outlasted their pregnancies by the time their cases reached the Court. Similarly, in Moore v. Ogilvie, 394 U.S. 814, 816 (1969) and Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972), the Court rejected mootness

arguments in cases challenging state election laws after elections had already occurred. In Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126-127 (1974), Justice Blackmun summarized this Court's approach to questions of mootness:

> "The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society . . . A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that con-

tinue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present."

The decision in Nebraska Press Association v. Stuart, 427 U.S. 539, 546-547 (1976), is directly on point on the issue of the mootness of the restraining order in this case. Reviewing a challenge to an order prohibiting pre-trial publicity, the Nebraska Press Court noted that petitioners' challenge was capable of repetition in two senses. First, the Court noted that if the defendant's conviction was reversed by the Nebraska Supreme Court and a new trial ordered, the district court could well have issued a second order to prevent a resurgence of publicity before the

re-trial. Second, and more important, the Court noted that the Nebraska Supreme Court's decision authorized state prosecutors to seek restrictive orders of the type challenged in appropriate cases. It was likely, therefore, that such orders would be issued in the future and that petitioners' rights would again be imperiled. Id. at 546-547.

Chief Justice Burger's reasoning in Nebraska Press is directly relevant to the present case. Miller's second trial could well result in a mistrial and third re-trial or a reversal of his conviction on appeal. Any such re-trial may therefore result in the reimposition of precisely the same order upon the same parties. More important, however, the opinion of the Ninth Circuit, like the opinion of the Nebraska Supreme Court, clearly invites

all district court judges to impose blanket "gag" orders on defense counsel in any case involving unpopular defendants and/or high visibility cases. Since Petitioners Levine and Greenberg are active criminal defense lawyers practicing in the Central District of California, it is certainly reasonable, indeed it is almost a virtual certainty, that future cases will see these same parties presented with an identical restriction upon their First Amendment rights.

The Nebraska Press principles have been repeatedly applied by this Court in cases where challenged orders concerning trial publicity have expired prior to the time of review. See Gannett Co. v. De Pasquale, 443 U.S. 368, 377-378 (1979); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-603 (1982). As the Court noted in

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980) (reviewing a challenge to a courtroom closure order issued in a criminal case):

> "This Court has frequently recognized [however] that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature. [Citations omitted.] . . . More often than not, criminal trials will be of sufficiently short duration that a closure order 'will evade review, or at least considered plenary review in this Court.'"

For this reason, it is frivolous for the United States to claim that this action is distinguishable on the grounds that it is attorneys -- not

the press -- who are being restrained by Judge Kenyon's order (Opp. at 9, n.8). Nowhere in his discussion of mootness in Richmond Newspapers does Chief Justice Burger even intimate that the identity of the restrained party is at all relevant to the Court's decision. The focus is instead upon the nature of the restraint and the fact that any restraining orders imposed using a criminal trial will never, as a practical matter, be fully appealed during the pendency of that trial. Id.

II

CONCLUSION

The writ should issue.

DATED: May 22, 1986.

Respectfully submitted,

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No. 85-1291

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JOEL LEVINE, STANLEY I. GREENBERG
AND RICHARD MILLER,
Petitioners,

VS.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES OF AMERICA,
Real Party in Interest.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a restraining order directed to a defendant's attorneys in a federal criminal prosecution also restricts the defendant's First Amendment right of free speech? Whether an individual looses certain first A rights by virtue of being charged with a criminal offense?

2. Whether the public's interest in the "integrity of the judicial process" and the appearance of fairness is a sufficiently compelling interest to justify prior restraints on the speech of defense counsel?

3. Whether defense counsel's comments to the press on the eve of trial pose a sufficiently serious and imminent threat to the fairness of the trial to justify prior restraint of free speech, where the trial district has a population of 12 million noted for it heterogeneity, no contention is made that defense counsel's statements to the press refered to any inadmissible evidence, and the threat to the trial's fairness is recognized to be speculative at best?

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No. 85-1291

IN THE
SUPREME COURT OF THE UNITED STATES
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JOEL LEVINE, STANLEY I. GREENBERG
AND RICHARD MILLER,

Petitioners,

vs.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as amicus curiae in support of petitioners, with the consent of petitioners and real party in interest, pursuant to Supreme Court Rule

36.4.[1]

NACDL is an organization with a membership of over 5,000 lawyers and law professors from all 50 states dedicated to the protection of the rights of criminal defendants and their lawyers and the promotion of fairness in the administration of criminal justice. NACDL annually files more than 100 amicus briefs in federal and states courts including this Court.

NACDL is profoundly concerned that defendants' rights to free speech, fair and public trials, and the presumption of innocence are accorded due weight when courts contemplate imposition or review of "gag" orders directed to their attorneys. If allowed to stand, the

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[1] Petitioner's counsel and the Office of the Solicitor General have both given their oral consent to the filing of this brief. Copies of their letters of consent will be submitted to the Clerk of the Court as soon as received.

opinion of the Ninth Circuit would significantly undermine those rights and create a "chilling effect on lawyers called upon to represent unpopular defendants in high visibility cases." (Justice Norris, dissenting from the Ninth Circuit's denial of the petition for rehearing, at A-115.)

NACDL fully supports the arguments made by petitioners. We submit this brief in order to highlight the rights of defendants and their lawyers implicated by the Ninth Circuit's decision below.

STATEMENT OF THE CASE

The instant case presents this Court with its first opportunity squarely to address the balance to be struck among competing constitutional rights implicated by restraining orders directed to defense attorneys in criminal prosecutions. The

Ninth Circuit balanced those interests by holding that a pretrial restraint on counsel's speech may be sustained upon a speculative finding that, in the absence of such restraint, publicity during trial would pose a serious and imminent threat to the fairness of the trial or to the integrity of the judicial process, even in the absence of specific findings that the measure would be effective and that alternatives less onerous to first amendment rights would be ineffective. In so holding, the Ninth Circuit concluded that the order did not implicate rights of petitioner Miller (defendant below), and that petitioners lacked standing to assert the right of access to information concerning important government processes.

The Seventh Circuit (in Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970), the only Circuit other than the Ninth to

confront the issue in the same posture herein presented[2] reached an opposite holding, giving rise to a clear conflict between the circuits. Moreover, while invoking this Court's opinion in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the Ninth Circuit so applied it as to reach a result at odds with both its letter and spirit.

If the decision of the Ninth Circuit below is permitted to stand, the effect would be to afford the courts, and derivitively the government, virtually unfettered discretion to silence individu-

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[2] In re Halkin, 598 F.2d 176 (D.C. Cir. 1979), noted by the Ninth Circuit (at A-53), concerned a restraint on attorney comments regarding information obtained pursuant to court-ordered discovery. In Seattle Times Co. v. Rhinehart, __ U.S. __, 81 L.Ed.2d 17 (1985), the Court stressed the significance of that distinction in holding that restraints on such comments did "not raise the same spectre of government censorship that such control might suggest in other situations." (Id. at 26-27.)

als accused of crimes in highly publicized cases. Additionally, the decision would strengthen the courts' and government's abiltiy to manipulate press coverage of, and public access to, information regarding criminal prosecutions. In the instant case, the government initally limited the public's and Miller's access to its evidence by proceeding by indictment only. Then, when the grand jury's preliminary examination was complete, the government held a series of press conferences to announce the issuance of an indictment. The burst of publicity could hardly fail to compromise Miller's right to the presumption of innocence particularly in light of the participation of high-ranking government officials at the press conferences.

Miller's counsel (and co-petitioners herein) made an effort to counter the

prejudicial publicity by responding to press questions. When the government dismissed four counts, surely an event of importance equal to the initial issuance of the indictment, Miller's attorneys took the opportunity to outline their version of the case and to note the significance of the government's dismissal.

The government then obtained the order, challenged by the instant petition, restraining counsel from making any further comments to the press. The government successfully overrode Miller's Fifth and Sixth Amendment rights to a fair trial, a public trial, and the presumption and appearance of innocence, his First Amendment right to protest governmental overreaching, and press and public's First Amendment right of access to imformation of public concern by invoking vague notions of "judicial integrity" and

"appearance of fairness". Whereas neither the trial nor appellate court questioned the government's standing to raise the public's interest in those values, petitioners were not permitted to assert the First Amendment rights of the press and public.

The government's success in limiting publication of information in the instant case is matched by its success in publicizing information of prosecutions over defense objection in other cases. When the government desires publicity, it proceeds by information. Defendants' efforts to close preliminary and other pretrial hearings increasingly are being rebuffed.[3] Measures such as change of

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[3] Of the four circuits that have addressed the issue of whether the public's constitutional right of access extends to pretrial hearings, all four have found that it does. Application fo the Herald Co., 734 F.2d 93 (2d Cir. 1984); United (Continued)

venue, continuance, extensive jury voir dire, instructions, and sequestration, discounted by the Ninth Circuit below as ineffective to guard against threats to "judicial integrity", are considered more than adequate to protect defendants' rights to a fair trial. See, e.g., Gannett v. DePasquale, 443 U.S. 368 (1979)

REASONS FOR GRANTING THE WRIT

I.

SUBSTANTIAL FIRST AMENDMENT RIGHTS WERE IMPLICATED BY THE RESTRAINING ORDER UPHELD BY THE NINTH CIRCUIT.

A. The Ninth Circuit's conclusion that a criminal defendant's free speech rights are not implicated by a restraining order directed to his attorney is erroneous and threatens fundamental free speech rights.

The Ninth Circuit determined that

States v. Chagra, 701 F.2d 354 (5th Cir. 1983); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982); United States v. Criden, 675 F.2d 550 (3d Cir. 1982). The issue is now pending before this Court in Press Enterprise Co. v. Superior Court, No. 84-1560 (October Term, 1985.)

the challenged restraining order directed against Miller's attorneys did not implicate Miller's first Amendment rights. The Court reasoned that Miller was able to communicate his side of the case to the media by testifying at the trial of his co-defendants pursuant to a grant of limited immunity. (A-38, n. 1.) In addition, he could issue statements to the media through his family members. Moreover, Miller's attorneys were only precluded from making extrajudicial statements; thus they remained "free to present Miller's case in open court." (Id.)

Those conclusions represent a distressing disregard of the rights of criminal defendants as well as of the proper function of the courts.

First, to suggest that a defendant is not disadvantaged by a gag order directed to his attorneys since he may

personally communicate with the media through press releases or in court wholly fails to take account of the defendant's right against self-incrimination. The Ninth Circuit's "solution" would impermissibly condititon the exercise of one fundamental right -- the right of free speech -- on relinquishment of a second -- the right not to incriminate oneself. See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (the government "may not deny a benefit to a person on a basis that infringes a constitutionally protected interest--especially, his interest in freedom of speech").

Second, the Circuit's suggestions reflect a disregard for the proper function of court hearings. It would hardly be appropriate for a defense counsel to attempt to use the forum of the courtroom to educate the public about his client's

case. Even more improper would be petitioner Miller's use of the occasion of testifying at a co-defendant's trial to communicate his knowledge and opinion of circumstances relevant to his own innocence.

Third, the court's suggestions depend, for any effectiveness, on the press being in the right courtroom at the right time. Yet, common experience shows that most newspapers are not likely to cover a trial from start to finish, and those that are limited to only partial coverage are most likely to attend at the beginning of a trial. There is no assurance that any press would be present when defense counsel might begin argument or cross-examination.

Fourth, the court's alternatives utterly deprive the defendant of any radio or TV coverage, since the local rules of

the district court exclude TV cameras and radio microphones from the courtroom. (U.S. District Court, Central District, Rule 28.1)

Fifth, quite apart from self-incrimination concerns, gagging a defendant's attorney places substantial content restrictions on a defendant's speech. In most cases, a defendant's lawyer will be his most effective spokesperson. The lawyer is likely to have greater credibility than his client, and be better able to communicate clearly the issues of greatest interest and significance to the public.[4]

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[4] "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion. Often their clients will not be as articulate or informed." Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied sub nom. Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).
(Continued)

B. The Ninth Circuit's conclusion that defense attorneys have less substantial free speech rights than other trial participants conflicts with prior decisions of this Court.

The Ninth Circuit concluded that "it is appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of non-participants ... [and that] the case for restraints on trial participants is especially strong with respect to attorneys." (A-48, citing Sheppard v. Maxwell, 384 U.S. 333, 360-363 (1966) and Nebraska Press Association, 427 U.S. at 564. See also A-43, citing In re Halkin, 598 F.2d 176, 195, & n. 44 (D.C.Cir. 1979).) Even assuming the validity of the first part of that proposition, the second

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As Lawrence Tribe has noted, "To the extent that criminal defendants rely on counsel to represent their interests both in and out of court, it would be problematic to impose greater restrictions on counsel than on the accused." Tribe, American Constitutional Law (1978), p.628.

part is dubious at best, particularly where as here the restraints were directed to attorneys for a criminal defendant.[5]

The relevant inquiry is not the status of the speaker but the nature of the speech sought to be restrained and the timeliness of the expression. Halkin, supra, 598 F.2d at 191, and cases cited thereat. An order restraining political speech or information of public concern implicates more substantial interests than an order restraining commercial speech. An order restraining highly newsworthy

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[5] In Sheppard v. Maxwell, supra, 384 U.S. 333, this Court particularly critized the trial judge for his failure to take any action to restrain the Coroner, police officers, and other prosecution witnesses (id. at 361) and admonished that "trial courts must take strong measures to ensure that the balance is never weighed against the accused." (Id. at 362.)

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), this Court expressly stated that it did not reach the question of whether restraints on lawyers' speech infringed First Amendment rights (at 565, n. 8).

information for a long period of time is more drastic than a temporary restraint of materials having constant but not topical interest. "The damage [due to a prior restraint] can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." Nebraska Press, supra, 427 U.S. at 559.

The speech of criminal defendants and their attorneys generally merits particular protection because of the importance of such speech in protecting fundamental interests of the defendant and the public. Consideration of the above factors strongly argues for the conclusion that the restraining order here at issue implicated substantial First Amendment and other interests.

Much of the information that the challenged order restrained -- including

comments on the absence of evidence, and the strengths or weaknesses of the case of either party (see A-69) -- was of considerable public significance. The comments of which the district court particularly complained drew critical attention to the manner in which petitioner Miller's prosecution was handled by the Justice Department, the United States Attorney's Office, and the FBI. Information about criminal prosecutions is of substantial societal concern; information "about police misconduct, and about allegations that those responsible to the public for the enforcement of laws themselves are breaking it" merits particular protection. Gannett Co. v. DePasquale, 443 U.S. 368, 435 (1979). See also United States v. Mandel, 408 F.Supp. 673, 678 (D.Md. 1975)

A defendant's Sixth Amendment right to a public trial is premised on the

assumption that public scrutiny benefits both fairness and the appearance of fairness. This Court has recognized that, "public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982). The press's oversight function "can be severely impaired ... if those who are most knowledgeable about injustices are silenced at the very moment at which they have the greatest incentive to protest." Freedman & Starwood, "Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 613 (1977). To the extent that attorney statements to the media can clarify and highlight certain in-court

events those statements are significant in drawing press attention to potential threats to the integrity of the fact-finding process.

Miller has a substantial First and Fifth Amendment interest in speech regarding his "character, credibility, or reputation" (proscribed at A-69) because such speech was the only way to safeguard his rights to a presumption of innocence and to protect his reputation in the face of prosecution-generated publicity concerning the charges against him.[6]

Moreover, the restraint was for a

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[6] The Seventh Circuit has commented relevantly: While we agree '[i]t is fundamental to our system of contitutional democracy that issues of law and fact in a criminal proceeding be resolved in the courts, and not in the news media nor in the streets,' we believe equally fundamental to our system is the right of all citizens, even if they be criminal defendants, to exercise their first amendment rights." Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) (per curiam).

substantial period of time. As of the date that the petition was filed in this case (January 1986) the restraining order had been in place for nearly a year. Timeliness is essential in the reporting of news about criminal prosecutions because "it is only when the litigation is pending and currect news that the public's attention can be commanded." Chicago Council of Lawyers, supra, 522 F.2d at 250.

As the Halkin court noted, "the Supreme Court has never squarely addressed the issue ... [of whether] orders restricting comments by parties and attorneys are a less drastic alternative to gagging the press." (598 F.2d at 195, n. 44) Arguably, prior restraints on defense attorneys may be as drastic as certain restraints on the press. This case presents this Court with the opportunity to squarely address these

issues.

C. The Ninth Circuit disregarded prior decisions of this Court in concluding that petitioners lacked standing to raise the public's right of access to information about important governmental processes and accordingly failed to give proper deference to that right.

The Ninth Circuit acknowledged that "By effectively denying the media access to the litigants, the district court's order raises an issue under the first amendment by impairing the media's ability to gather news." (A-44) The Ninth Circuit declined to consider the interest in news gathering, however, because it concluded that petitioners lacked standing to raise the rights of the media. Petitioners cite compelling authority calling into doubt the correctness of that conclusion. (See Petition, pp. 56-63.)

Even assuming, for the sake of argument, that petitioners had no standing to raise the interests of the media, they

surely had standing to raise the public's correlative first amendment right of access to information about important government functions. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582 (Stevens, J., concurring.) In Waller v. Georgia, 457 U.S. 39 (1984) this Court indicated that it would have reached the issue of the public's access interest had it not upheld the defendant's right to an open suppression hearing under the Sixth Amendment. Id., n. 6. The Court made no mention of any standing problem. Similarly, the Court recognized that the accused shares with the public the right of open access to court proceedings. Press Enterprise Co. v. Superior Court, 464 U.S. 501, 78 L.Ed. 629, 641 (1984).[7]

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[7] "For present purposes, how we allocate the 'right' to openness as between the accused and the public, or whether we view it as a component (Continued)

The public's interest in access to information is both substantial and distinct from the media's access interest.

> "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibt government from limiting the stock of information from which members of the public may draw. Richmond Newspapers v. Virginia, 448 U.S.555, 575-576 (opn. by Burger, C.J., joined in by White and Stevens, JJ.[8]

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intherent in the system benefitting both, is not crucial." 78 L.E.d2d at 637. See also Blackmun, J., concurring, id. at p. 641, noting that jurors' privacy rights are adequately represented by defendants because they share an interest in protecting those rights.

[8] See also Richmond Newspapers at 587-588 (Brennan and Marshall, JJ., conc.):

> Implicit in the[] structural role [played by] ... the First Amendement ... in securing and fostering our republican form of government ... is not only 'the principle that debate of public issues should be uninhibited, robust, and wide-open,' New York Times v. Sullivan, 376 U.S. 254, 270 (1964), but the antecedent assumption that valuable public debate--as well as other civic behavior--must be informed."

II.

IN ORDER TO JUSTIFY A PRIOR RESTRAINT OF SIGNIFICANT FIRST AMENDMENT RIGHTS, IT MUST BE SHOWN BY CONCRETE EVIDENCE THAT THE THREAT TO A FAIR TRIAL IS SERIOUS AND IMMINENT, THAT THE PRIOR RESTRAINT WILL BE EFFECTIVE, AND THAT OTHER LESS DRASTIC MEASURES WOULD BE INEFFECTIVE; SPECULATION WILL NOT SUFFICE.

The Ninth Circuit concluded that the district court's findings were adequate to support the prior restraint despite the fact that the district court conceded that "the extent of ... publicity in [sic] its prejudicial potential is of necessity speculative ... ." (A-60.) The court justified approval of the prior restraint solely on the following grounds: (1) "it is apparent that this case has received widespread publicity" (A-64); (2) "[t]he district court found that the level of publicity would increase as the trial approached" (id.)[9]; (3) "even if an

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[9] In fact, the district court made no such (Continued)

impartial jury could be selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences" (id. at A-63); (4) "the circus-like environment that surrounds highly publicized trials threatens the integrity of the judicial system" (id.); and (5) "the district court properly found that its order would be effective" (A-65-66).

The Ninth Circuit's perfunctory examination contrasts starkly with the careful analysis performed by this Court in Nebraska Press, and "violates both the spirit and letter of that opinion." (A- , opn. of Nelson, J., concurring and

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finding, at least according to the record quoted by the Ninth Circuit in its opinion. Rather, the district court found "it quite reasonable to expect that such publicity has been and will become even more pervasive". (A-61.)

dissenting)

A. The threat to a fair trial must be clear.

This Court in Nebraska Press noted that several of its prior decisions "demonstrate that pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial." 427 U.S. at 554. Rather, from the record, it must be "clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." (427 U.S. at 569.) In Nebraska Press, this Court found that the findings of the trial judge were inadequate because "[h]is conclusion as to the impact of such publicity on prospective jurors was of

necessity speculative, dealing as he was with factors unknown and unknowable." (Id. at 563.)

Similarly, in Chase v. Robson, 435 F.2d 1059 (7th Cir. 1059), the Seventh Circuit held that, "before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' [Citation.]" (Id. at 1061)

There is no record that the trial judge below made any specific findings to support his conclusion that defense attorney access to the media would pose a serious threat to a fair trial. Moreover, "his conclusion as to the impact of such publicity on prospective jurors" was

concededly speculative and thus not based on clear evidence.

B. Threats to the public's interest in the "integrity of the judicial process" posed by the likelihood of prejudicial publicity during trial cannot justify imposition of a prior restraint before trial, and may only be imposed once trial has commenced after other less drastic measures have been tried.

The Ninth Circuit held that a restraining order was necessary in the instant case because media coverage of defense statements, regardless of whether it seriously and imminently threatened the trial's fairness, and regardless of whether other measures could adequately safeguard actual fairness, nonetheless would injure the appearance of "the integrity of the judicial process". The majority's paramount concern was that a large amount of publicity would give rise to a "circus-like environment" and that such an environment would "threaten[] the

integrity of the judicial system." (A-63. See also A-60, quoting the order of the district court.) Justice Sneed, concurring, called this interest the "public's expectation that the trial will be fair", which is to be weighed against "the right of the accused to an impartial jury". (A-88, emphasis added.)

The court distinguished Nebraska Press and other precedents on the ground that they involved orders "aimed solely at curbing pretrial publicity." (A-62) The court rejected alternatives less onerous to First Amendment freedoms suggested in Nebraska Press -- including searching voir dire and emphatic jury instructions -- on the ground that such measures cannot alleviate the harm to the integrity of the judicial process caused by extrajudicial statements of trial participants. (A-73, A-75.)

While this Court in Nebraska Press did not address the potentially prejudicial impact of trial publicity, several commentators have opined that the Court would prohibit pretrial restraints on speech during trial, and would limit approval of trial restraints only after other measures had been tried and concretely shown to be indadequate.[10] That conclusion is presaged by the following passage in Sheppard v. Maxwell:

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (384 U.S.

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10 See, e.g., Tribe, American Constitutional Law (1978), p. 627; Prettyman, "Nebraska Press Associaation v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?" 20 St. Louis L. J. 654, 658 (1976); Howard and Newman, "Fair Trial and Free Press: A Background Report," in House Committee Doc., 94th Cong., 2d Sess., 84 (1976).

at 363.)

Read in light of the disapproval of prior restraints in Nebraska Press, that passage suggests that attorney speech should only be regulated after censure, or perhaps contempt orders, have failed.[11] In a similar context, this Court has assumed that, "After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." Gannet

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[11] It should be kept in mind that what concerned the Ninth Circuit below was not the leakage of a single piece of prejudicial information that by itself could prejudice the trial; petitioners do not assert a right to release information prejudicial to a fair trial and unlikely to be admissible at trial. Rather the court below was worried about pervasive publicity that would create a circus-like environment. Thus, it is highly unlikely that the integrity of the judicial process would be irreparably damaged by a single contact between defense counsel and media. Should one contact, or several contacts, create a "circus-like" environment, it would be time enough to censure counsel, restore decorum, and eventually perhaps even impose restraints.

Co. v. DePasquale, 443 U.S. 368, 378 (1979)(concerning closure of pretrial suppression hearings). The correlative assumption, that information prejudicial to the government's interest in a fair trial can be kept from a jury by a variety of means, should be equally be valid.

One question here raised is whether restraints on attorney statements during trial may be justified pretrial on the basis of speculative assumptions (1) that pervasive publicity will continue, and (2) that no alternatives less onerous to First Amendment rights -- including change of venue, postponement of trial, searching jury voir dire, jury instructions, and sequestration -- will be effective in protecting the appearance of "judicial integrity". By deciding that question in the affirmative, the Ninth Circuit has created an exception to the Nebraska Press

rule large enough to swallow the rule, affording courts virtually unguided discretion to impose and sustain prior restraints.

A related question is whether the "integrity of the judicial process" or the "public's expectation in a fair trial" can ever justify a prior restraint on defense counsel speech. This Court recently noted that, "'Although litigants do not 'surrender their First Amendment rights at the courthouse door,' In re Halkin, 598 F.2d at 196, those rights may be subordinated to other interests that arise in this setting." Seattle Times Co. v. Rhinehart, ___ U.S. ___, 81 L.Ed.2d 17, 27 (1985). The Court refers to three of its decisions in which it subordinated First Amendment rights to a criminal defendant's right to a fair trial. It refers to no other criminal case in which some other

right justified a restraint on First Amendment freedoms.

C. Any conclusion that a prior restraint would be effective must be based on specific findings.

The Ninth Circuit's examination of the effectiveness of a restraining order was limited to the following three sentences:

> "Both the Supreme Court and this court have recognized the effectiveness of restraining orders against trial participants. [Citations.] Moreover, the district court found that extrajudicial statements by attorneys threatened to create extensive prejudicial publicity. Accordingly, we conclude that the district court properly found that its order would be effective." (A-65.)

Such a discussion, amounting to no more than a bare syllogism hardly satisfies the requirement that the circuit court is to "examine the evidence before the judge when the order was entered" (427 U.S. at) in applying the Nebraska Press

analysis. As noted by Justice Nelson, concurring and dissenting in the Ninth Circuit's opinion below, "Publicity in this case is likely to be widespread even if the district court restricts attorneys' comments to the press." (A-96) Moreover, because the restraint is directed primarily against defense counsel, it cannot be assumed that the balance of competing Sixth Amendment rights weighs in favor of a prior restraint, let alone that a prior restraint could be justified when the first amendment rights of petitioners, public and press are considered as well.

D. Any finding that less drastic measures would not be effective must be supported by specific findings.

The Ninth Circuit's opinion is astonishing in its wholesale rejection of measures short of prior restraint of defense attorney speech to assure trial fairness. The Ninth Circuit concluded

that the "objective . . . that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by outside influence, . . . can be obtained only if publicity created by private litigants is subject to reasonable restrictions. [¶] . . . Accordingly, the judiciary cannot escape the task of fixing the limits within which a defendant may attempt to create publicity." (A-58, emphasis added.)

That statement turns on its head the rulings by this Court in Nebraska Press and other cases that prior restraint of substantial First Amendment rights should be a measure of last resort to be imposed only after other measures have been shown to be inadequate. Any restriction imposed may not simply be "reasonable" but must by "strictly

necessary and narrowly drawn.

Moreover, the Ninth Circuit's reasoning places an unprecedented burden on defendants, the only "private litigants" in a criminal prosecution. Prevailing law, however, holds that, if anything, defendants and their counsel are entitled to greater leeway in recognition of the disadvantages under which they labor.

CONCLUSION

The Court should issue its writ of certiorari in order to consider the substantial questions herein presented.

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